

Overview of *The UK Bribery Act*

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1. Introduction

The Bribery Act 2010 (“the Bribery Act”) came into effect on 1st July 2011 and has altered significantly the law relating to bribery and the scope of its application. The Act does not have retrospective effect and any investigation or prosecution relating to earlier activity is not affected.²

1.1. Background

The impetus for reform in the UK was attributable to growing national and international pressure. With the advent in the United States of the Foreign Corrupt Practices Act (“the FCPA”) in 1977, bribery became the focus of reform on an international level. The OECD was openly critical of the UK’s “continued failure to address

deficiencies in its laws on bribery of public officials and on corporate liability for foreign bribery...”, suggesting that shortcomings in the existing legislation and its implementation had impeded the effective investigation of bribery allegations.³ In 1998, the UK Law Commission produced a consultation paper and a report on corruption⁴ which resulted in a draft bill sponsored by the government. It met with severe criticism from the House of Commons Joint Committee who lambasted its clarity, drafting and lack of comprehensibility whilst simultaneously recognising the need for imminent reform.⁵ In response, the Home Office issued its own consultation paper⁶ and subsequently referred the issue back to the Law Commission, with a view to formulating a revised draft Bill.⁷ This was published in 2008 and provided the basis of what is now the Bribery Act.

1.2. Historical Overview

Statutory provision for bribery was found primarily in the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Part 12 of Anti-Terrorism, Crime and Security Act 2001 extended the application of this legislation to corrupt acts committed abroad by a UK national or a company incorporated under UK law. This legislation has been overtaken by the Bribery Act.⁸

In the Bribery Act, the new provision for extra-territorial application is found in section 12. It extends the jurisdiction of the UK court beyond an act committed in the UK, to an act committed abroad by someone who has a ‘close connection’ with the UK.⁹ Further, a company or partnership can be criminally liable for failure to prevent bribery even where no constituent element of the offence occurred in the UK.¹⁰ It follows that a Brazilian company with a UK business presence can become criminally liable in the UK if it fails to prevent bribery occurring within the organisation, regardless of where the act of bribery occurs.

3. OECD Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, United Kingdom: Phase 2Bis October 1998, 4.

4. Law Commission, “Legislating the Criminal Code: Corruption” (1997) Consultation Paper No 145; “Legislating the Criminal Code: Corruption” (1998) Law Com No 248.

5. Joint Committee on the Draft Corruption Bill, Session 2002-2003, HL Paper 157, HC 705 (2003).

6. Home Office, “Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper”, Central Office of Information (COI), December 2005.

7. Law Commission, “Reforming Bribery”, HM Stationary Office, Law Com No.313, 14, para. 2.35-2.39.

8. Bribery Act, Schedule 2.

9. Bribery Act, s.12(2)(c). ‘Close connection’ is defined in s.12(4) of the Bribery Act.

10. *ibid.*, s.17(1).

The UK Ministry of Justice published the draft Bill on 25 March 2009 for pre-legislative scrutiny. Subsequently, the Bill was introduced into Parliament on 19 November 2009. The House of Lords and House of Commons Joint Committee on the Draft Bill¹¹ welcomed the draft Bill, particularly the new offence attaching liability to a corporation for failure to prevent bribery by a person associated with the organisation. However, the need to prove the negligent nature of the failure, as recommended by ‘negligence’ as contained in the proposals of the Law Commission, was considered to be overly narrow and unnecessarily complex.¹² Recognising that omitting a negligence requirement would render a commercial organisation strictly liable, the Joint Committee stated this was not unduly harsh considering that this approach is found in corresponding statutes of other countries and that, as the Joint Committee noted, “a commercial organisation is well placed to demonstrate the adequacy of its anti-bribery procedures.”¹³ The Joint Committee agreed that a defence should be available where a company could demonstrate that it had ‘adequate procedures’ in place to prevent bribery taking place.¹⁴

Organisations with a business presence in the United States will already have put in place compliance programmes in order to satisfy the requirements of the FCPA.¹⁵ However, since some provisions of the Bribery Act impose more extensive requirements than those contained in the FCPA, Brazilian companies will need to adjust existing compliance programmes so as to ensure compliance with the more robust provisions of the UK legislation.

1.3. Divergence from the FCPA

The most salient difference between the United States and UK legislation is that the Bribery Act applies equally across both the public and private sectors, whereas the FCPA applies solely to the bribery of a foreign public official.¹⁶ There are other significant differences too. The FCPA contains a number of limited exceptions for facilitation payments;¹⁷ this is not the case with the Bribery Act, which prohibits the making of facilitation payments in all circumstances.¹⁸ Also, the FCPA does not capture a person who receives a bribe, unlike the Bribery Act which contains a specific offence directed at ‘passive bribery’.¹⁹

11. House of Lords House of Commons, “Joint Committee on the Draft Bribery Bill: First Report of Session 2008-2009: Vol 1”, House of Commons London: HM Stationary Office, HL 115-1, HC 430-1.

12. *Ibid.*, para. 89.

13. *Ibid.*, para. 89.

14. *Ibid.*, para. 91-93.

15. 15 U.S.C. §§ 78dd-1 et seq.

16. 15 U.S.C. §§ 78dd-1(a) and (1) (1)

17. 15 U.S.C. §§ 78dd-1(b), 1(f) (3)

18. Bribery Act, s. 2.

Finally, there is no equivalent provision in the FCPA to the new corporate offence to prevent bribery contained in the Bribery Act.

The consequences of being convicted under these different statutes also differ. Under the FCPA, the authorities may exercise their discretion and debar an organisation or individual from public procurement. Under the Bribery Act, this debarment is mandatory upon conviction.¹⁹ A conviction under the Bribery Act can also trigger liability under the UK's Proceeds of Crime Act 2002 for money laundering the proceeds of bribery.

1.4. Extra-territoriality

The relevance of the Bribery Act for Brazilian organisations is its extensive territorial application. Under the Bribery Act, the jurisdiction of the UK courts is not limited to jurisdiction to try offences committed in the UK.²⁰ Jurisdiction is expanded to include offences where any part of the offence of bribing,²¹ being bribed²² or bribing a foreign public official²³ contained in the Act is committed abroad by a person who has a 'close connection'²⁴ with the UK.

A 'close connection' with the UK is established where a person is a British subject²⁵ or where, in the case of company, it is incorporated under UK law.²⁶ This has the effect of making liable a person who is ordinarily resident in the UK for an offence that happens abroad and which, if committed in the UK, would form part of the offence.²⁷

The jurisdictional application is extended even further in the new corporate offence of failure by a commercial organisation to prevent bribery (section 7). An offence is committed under this provision irrespective of whether any part of the offence occurred in the UK and regardless of whether the person committing it has any 'close connection' with the UK.²⁸ In consequence, a Brazilian company which has a business presence in the UK can become liable under the Bribery Act for commission of the corporate offence even where the company is based somewhere else in the world. So, for example, it is possible for a Brazilian subsidiary company to expose its UK parent company to criminal

19. By virtue of the Bribery Act 2010 (Consequential Amendments) Order 2011, the provisions of the Public Contracts Regulations 2006 were amended to include Regulation 23(1) which includes a conviction for bribery under section 1 or section 6 of the 2010 Act as a criterion for the rejection of bids for public contracts.

20. Bribery Act, s.12 (1).

21. Bribery Act, s.1.

22. Bribery Act, s.2.

23. Bribery Act, s.6.

24. Bribery Act, s.12 (2) (c), s.12 (4).

25. Bribery Act, s.12 (4) (a)–(g).

26. Bribery Act, s.12 (4) (i).

27. Bribery Act, s.12 (2).

28. Bribery Act, s.12 (5), s.12 (6).

liability by reason of its failure to have adequate procedures in place to prevent the occurrence of a bribery offence, and *vice versa*.

2. The criminal offences

2.1. Bribing – section 1 offence

The Bribery Act criminalises both the act of bribing another person²⁹ and the act of receiving a bribe.³⁰ This legislation is unusual because rather than providing a definition, it provides illustrative scenarios.

Under section 1, a person is guilty of an offence of bribing another person where:

- (a) P offers,³¹ promises or gives a financial or other advantage to another person, and
- (b) P intends the advantage—
 - (i) to induce a person to perform improperly a relevant function or activity, or
 - (ii) to reward a person for the improper performance of such a function or activity.³²

The second scenario in which liability attaches is when:

- (a) P offers, promises or gives a financial or other advantage to another person, and
- (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.³³

These cases criminalise providing a bribe with the objective of inducing the recipient to act 'improperly' or providing a bribe in the knowledge that accepting it would be a compromise of the recipient's role or function. To be liable, it is not necessary for the recipient to have performed or agreed to perform the request. A person is still liable where 'he or she represents a willingness to confer an advantage'³⁴ to the recipient of the bribe. What constitutes a representation depends on the circumstances but the significance of this provision is that a representation can be inferred. For example, the Law Commission discusses a scenario in which one person interviews another with an open briefcase full of money on the desk.³⁵ Thus, an offer can be made impliedly to a prospective

29. Bribery Act, s.1.

30. Bribery Act, s.2.

31. 'P' denotes 'provider' of the bribe.

32. Bribery Act, s.1(2).

33. Bribery Act, s.1 (3).

34. Law Commission, note 7, para. 3.42.

35. *Ibid.*, para. 3.43.

... person. Any manifestation of a willingness to confer an advantage will constitute an offer or promise for the purposes of this offence.

There must be a causal link between the offer, promise or gift and improper performance of the relevant function. In this way, the actions of the provider of the bribe must engage, and be intended to engage, how the recipient performs its function. Both the definitions of 'improper performance'³⁶ and 'relevant function'³⁷ are defined within the Act.

An offence is also committed where a person offers another person an advantage in the knowledge or belief that acceptance would be an improper performance of the recipient's function. This provision criminalises offering an advantage where there is no intent to influence how the recipient performs but which the provider knows or believes to be a 'compromise of the recipient's position' to accept.³⁸ The Law Commission acknowledged that "it will rarely be the provider's intention to compromise the recipient by persuading him or her to accept the advantage."³⁹ Accordingly, it is possible for an individual to be guilty of an offence where he naively offers a benefit to another, without any intention of obtaining an advantage, but knowing that accepting that benefit may not be strictly in accordance with the prospective recipient's function. This liability is premised on the belief that conferring a benefit can "have a corrosive effect on standards meant to be observed by those who receive them, not least when such standards relate to the performance of public duties."⁴⁰

Key Concepts

The concept of a 'relevant function' includes any function of a public nature⁴¹ or connected with business,⁴² any activity performed in the course of a person's employment⁴³ and an activity performed on behalf of another (whether an individual or a corporate).⁴⁴ 'Improper performance' of a relevant function is a determinative element of the general bribery offences. This is defined in the legislation as an act which is "performed in breach of a relevant expectation and "is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation."⁴⁶ Improper performance suggests that there was a breach of an

expectation of good faith,⁴⁷ impartiality⁴⁸ and trust.⁴⁹ These expectations are defined by reference to "what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned".⁵⁰ Another key concept in the Bribery Act is the notion of a 'financial or other advantage'. Whilst each offence requires proof of this element, no statutory definition is provided. The Law Commission concluded that a definition was unnecessary since the words were said to be capable of being interpreted on their plain meaning.⁵¹

2.2. Being bribed – section 2 offence

The second offence created by the Bribery Act is known as 'passive' bribery, although plainly there still needs to be some activity on the part of the recipient. This provision also provides a number of illustrative scenarios:

- 1) Case 3 is where R⁵² 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).
- 2) Case 4 is where—
 - (a) R requests, agrees to receive or accepts a financial or other advantage, and
 - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- 3) Case 5 is 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.
- 4) Case 6 is 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—
 - (a) by R, or
 - (b) by another person at R's request or with R's assent or acquiescence.⁵³

To be found guilty of an offence under section 2, the recipient of the bribe or advantage must actively participate in obtaining it. Passively receiving a bribe is not enough to be liable of an offence under this section. The recipient has to have elicited the advantage in some way. The request and agreement to receive

36. Bribery Act, section 4.
37. Bribery Act, section 3.
38. Law Commission, note 7, para. 3.73.
39. *Ibid.*, para. 3.75.
40. *Ibid.*, para. 3.74.
41. Bribery Act, s. 3 (2)(a).
42. Bribery Act, s. 3 (2) (b).
43. Bribery Act, s. 3 (2) (c).
44. Bribery Act, s. 3 (2) (d).
45. Bribery Act, s. 4 (1) (a).
46. Bribery Act, s. 4 (1) (b).

47. Bribery Act, s. 3 (3).
48. Bribery Act, s. 3 (4).
49. Bribery Act, s. 3 (5).
50. Bribery Act, s. 5 (1).
51. Law Commission, note 7, para. 3.38.
52. "R" denotes the recipient.
53. Bribery Act, s. 2 (2) - (5).

an advantage by the recipient can also be implied.⁵⁴ 'To agree to receive' or 'request' implies that the recipient or prospective recipient plays an active role in securing that advantage. It was with these considerations in mind that the Law Commission did not advocate the imposition of criminal liability solely on the basis of receipt.⁵⁵

Case 4 is particularly broad and means that liability can attach where a recipient accepts a gift without realising that acceptance is in breach of the standards of their status or profession or the standards of their employer.

The scenarios contained in this section cast the potential net of criminal liability very wide and can inculpate a wide range of people who were not directly involved in accepting, requesting or receiving the advantage at the outset. For example, under case 6, if the recipient of an advantage involves other people in carrying out performance of the function improperly, then these people are implicated and potential accessories to the offence committed by the recipient. It does not matter that they have not received any benefit from the arrangement. All that is required is some knowledge or awareness of the arrangement. Considering the reality of large commercial organisations and the degree of inter-departmental interaction, the breadth of application of these new offences is appreciable.

2.3. Bribing a foreign public official – section 6 offence

The offence of bribing a foreign public official is contained in section 6, which states that an offence is committed where a person tries to influence a foreign public official in their professional capacity by way of bribery.⁵⁶ The intention behind providing an advantage must be to either obtain or retain business⁵⁷ or 'an advantage in the conduct of that business'.⁵⁸ Influencing a foreign public official in the discharge of their functions also extends to influencing an official so that they turn a blind eye⁵⁹ and any influence derived from the status of the role of a public official itself.⁶⁰

A 'foreign public official' is defined for the purposes of the Act as an individual who:

- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

- (b) exercises a public function i. for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or ii. for any public agency or public enterprise of that country or territory (or subdivision), or
 - (c) is an official or agent of a public international organisation.⁶¹
- 'A public international organisation' is defined to mean an organisation whose members comprise of countries or territories, governments of countries or territories, other public international organisations, or any mix of these.⁶² A public organisation includes organisations such as the World Bank or the United Nations.⁶³

The meaning of 'written laws'

Where an advantage is permitted by the applicable 'written law' to influence a foreign public official, no offence occurs.⁶⁴ A 'written law' refers to "any written constitution, or provision made by or under legislation applicable to the country or territory concerned or any judicial decision which is so applicable and evidenced in published written sources".⁶⁵ However, it is no defence to assert that a bribe was paid because of the prevailing culture of corruption present in the country in question. An example provided by the UK Ministry of Justice is the provision of additional investment in the community by organisations tendering for public contracts, which can be tantamount to providing a bribe in some circumstances.⁶⁶ Where local planning law requires this additional investment, there is no offence.⁶⁷

Facilitation payments

The offence of bribing a foreign public official is separate from the general 'bribe' offence in section 1, and therefore, in appropriate cases, a person will be vulnerable to prosecution under both sections 1 and 6.⁶⁸ But inevitably there is a degree of overlap between the two offences and facilitation payments are an example of where these discrete offences are most likely to coalesce. The payment of a facilitation payment could also expose an organisation to criminal

54. Law Commission, note 7, fn.54.

55. *Ibid.*, para. 3.82, 3.83.

56. Bribery Act, s.6 (1).

57. Bribery Act, s.6 (2) (a).

58. Bribery Act, s.6 (2) (b).

59. Bribery Act, s.6 (4) (a).

60. Bribery Act, s.6 (4) (b).

61. Bribery Act, s.6 (5).

62. Bribery Act, s.6 (6).

63. Ministry of Justice, "The Bribery Act 2010 Guidance", HM Stationary Office, para. 22.

64. Bribery Act, s.6 (3) (b).

65. Bribery Act, s.6 (7)(c)(i).

66. Ministry of Justice, note 63, para. 25.

67. *Ibid.*

68. Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, *available at* <<http://www.sfo.gov.uk/media/167348/bribery%20>

&www.dpp.gov.uk/prosecution%20guidance.pdf> (accessed 7 September 2011).

liability for failure to prevent the occurrence of bribery contrary to section 6 of the Bribery Act.⁶⁹

The UK Ministry of Justice recognises that in some instances an organisation may have little choice but to accede to a demand by a foreign public official for payment of a facilitation fee, for example, to expedite Government action. In such situations, the prosecuting authorities have indicated that they may decide not to prosecute any criminal offences where it would not be in the public interest to do so.⁷⁰ The prosecuting authorities will take into account whether an organisation had appropriate anti-corruption policies and procedures in place.⁷¹ The prosecution guidance also envisages a situation where a payer is "in a vulnerable situation arising from the circumstances which the payment was demanded."⁷² This suggests that a one-off payment, made in difficult circumstances, is unlikely to be prosecuted. Also, where there is an imminent threat to "life, limb or liberty", it is possible for a company to rely on the common law defence of duress.⁷³

This pragmatic approach to prosecution aligns the likely enforcement with the FCPA which allows the making of facilitation payments in certain instances.⁷⁴ Similarly, the OECD Convention⁷⁵ condemns facilitation payments but does not expressly prohibit them.⁷⁶ This has resulted in different approaches being adopted by parties to the Convention, where, for example, countries like Canada, New Zealand and Australia permit payments directed at expediting routine government functions.⁷⁷

Corporate hospitality

Corporate hospitality is another potential area that can give rise to liability under both section 1 and section 6 offences. This is a difficult area because the provision of hospitality and promotional expenditure is an established part of business and the objective of the Bribery Act is not to penalise those activities. It is only in circumstances where corporate hospitality is disproportionate and beyond reasonable limits that the provisions of the Bribery Act will be engaged.

69. Bribery Act, s.7.

70. Law Commission, note 7, para. 5.108-5.110.

71. Joint Prosecution Guidance, note 68, p. 9.

72. *Ibid.*, p. 9.

73. Ministry of Justice, note 63, para. 48.

74. See note 16.

75. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions available at <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>> (accessed 6 September 2011).

76. *Ibid.*, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para. 9.

77. Law Commission, note 7, para. 5.89.

The provision of corporate hospitality crosses the Rubicon and constitutes a criminal offence where it is either directed at securing or influencing "improper performance"⁷⁸ or was intended to influence a public official in their professional capacity with the aim of securing a business advantage.⁷⁹ The connection between the provision of the corporate hospitality and these objectives must be established. This connection will be determined by reference to the surrounding circumstances. Important criteria in assessing whether corporate hospitality circumstances include the type and nature of hospitality on offer, the manner in which it is provided and the 'level of influence the particular foreign official has over awarding the business.'⁸⁰ Ultimately, the test of whether corporate hospitality is acceptable is to ensure it is necessary, proportionate, *bona fide* and defensible.

2.4. Failure to Prevent Bribery – section 7

The most radical offence created by the Bribery Act is contained in section 7 and involves the failure of a commercial organisation to prevent bribery.⁸¹ This offence represents a highly significant development because it applies to commercial organisations, it has extra-territorial application and it is a strict liability offence. Under this provision, a commercial organisation is liable where a person "associated with" the organisation bribes another, with the intention of obtaining or retaining business for the organisation or obtaining or retaining an advantage for the organisation's business relationship. Hitherto, it has been extremely difficult for the prosecution to prove corporate liability where a person 'associated with' the commercial organisation accepted a bribe.

"Associated with"

A person associated with an organisation is one who "provides services for or on the behalf of" the organisation,⁸² such as an employee, an agent or a subsidiary.⁸³ Whether a person provides services is determined by reference to the particular circumstances of the case, but where that person is an employee there is a presumption that this is the case. Accordingly, an employee will almost certainly be treated as an 'associated person' within this section.⁸⁴

There is no requirement that a person 'associated with' an organisation must have a connection with the UK or a formal contract with the organisation in

78. Bribery Act, s.1.

79. Bribery Act, s.6.

80. Ministry of Justice, note 63, para. 28.

81. Bribery Act, s.7.

82. Bribery Act, s. 8 (1).

83. Bribery Act, s. 8 (3).

84. Bribery Act, s.8 (5).

question. It is a case of substance over form, so regardless of the capacity in which a person works, if a person provides a service for or on behalf of a corporation he will fall within the scope of this provision. For example, contractors and suppliers who provide services, beyond merely selling goods, fall within its scope.

Liability can also arise where a joint venture operates as a separate legal entity. The joint venture is 'associated with' its constituent members who can be criminally liable where the joint venture provides services and commits a bribery offence under the statute. However, a constituent member of a joint venture will not be liable in the event that he benefits indirectly from an offence committed by an employee or agent of the joint venture operating independently of him.⁸⁵

Conversely, where a joint venture is operating under a contractual agreement, the degree of control exercised by the respective constituent members will be a crucial factor in deciding whether one party is 'performing services for or on behalf of' another. However, even if it is established that within a joint venture an employee, agent or subsidiary was performing services for that organisation, it is necessary to prove that this person had the requisite intention.⁸⁶ This is true of any commercial organisation – benefiting indirectly from an offence is not sufficient to attract liability. A person who commits the offence must do so with the requisite intention.⁸⁷

"Relevant Commercial Organisation"

This offence is applicable only to a 'relevant commercial organisation'. This is defined in the statute to include an organisation incorporated in the UK which carries on a business,⁸⁸ an organisation incorporated anywhere which carries on a business or part of a business in the UK,⁸⁹ and a partnership formed under UK law which carries on a business⁹⁰ or a partnership (wherever formed) which carries on business or part of a business in the UK.⁹¹ The phrase "part of a business" is very broad and means that any organisation with a UK business presence can be a 'relevant commercial organisation' for this purpose.

From the perspective of a Brazilian based organisation with a UK subsidiary, the meaning of 'part of a business' is of real significance. The UK Ministry of Justice guidance indicates that, as regards companies incorporated outside of the UK, determining whether they are carrying on business in the UK will be determined by applying 'a common sense approach'. However, having a UK

subsidiary "will not in itself mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."⁹² The guidance indicates that this approach should result in only those organisations with 'a demonstrable business presence' being held criminally liable under the legislation.⁹³ This suggests that an organisation would have to have a representative office as part of a demonstrable business presence. The determinative factor will be the degree of control that the parent company exerts on its subsidiary company in the UK and whether the subsidiary company acts or acted independently.

However, considering the wide phrasing used, having any UK business interest is potentially sufficient and a Brazilian organisation with a UK business presence would be wise to err on the side of caution and proceed on the basis it is a 'relevant commercial organisation'.

Predicate offence

There is no requirement for the prosecution or conviction of a person for an underlying bribery offence, sometimes referred to as a "predicate offence", for an organisation to be held criminally liable under section 7.⁹⁴ However, in any prosecution for the corporate offence, the prosecution must be able to prove that such an offence had been committed, and the obligation rests on the prosecution to establish the case beyond reasonable doubt.

The corporate offence is not treated by the legislation as a substantive bribery offence. It does not displace direct corporate liability,⁹⁵ so if a director or company officer with requisite seniority and control (known as 'the directing mind' of the company) can also be identified as having committed an offence under the Bribery Act, the commercial organisation could be liable for the bribery offences too.

Section 7 has an even wider extra-territorial application than other offences in the Bribery Act because it is not necessary for the person associated with the organisation to have a 'close connection' with the UK.⁹⁶ This means that within a multinational corporation, the actions of any employee, agent or subsidiary within that organisation, can expose it to liability under the Act.⁹⁷ This emphasises the paramount importance of having adequate procedures in place to combat bribery. This is the only available defence in the event that an organisation faces potential liability under section 7.

85. Ministry of Justice, note 63, para. 40.

86. *Ibid.*, para. 42.

87. *Ibid.*, para. 42.

88. Bribery Act, s. 7 (5) (a).

89. Bribery Act, s. 7 (5) (b).

90. Bribery Act, s. 7 (5) (c).

91. Bribery Act, s. 7 (5) (d).

92. Ministry of Justice, note 63, para. 36.

93. *Ibid.*

94. Bribery Act, s. 7 (2).

95. Joint Prosecution Guidance, note 68, p. 11.

96. Bribery Act, s. 7 (3)(b).

97. Provided that the organisation has a UK business presence or is incorporated under UK law.

2.5. Personal liability as an accessory

By section 14 of the Bribery Act, a senior officer of a company can be fixed with personal criminal liability for offences committed by the company under sections 1, 2 or 6.⁹⁸ This is a form of accessory liability and the senior officer is liable where the offence is proved to have been committed with their consent or their connivance.⁹⁹ The notions of consent and connivance are not susceptible to precise definition and in practice the senior officer's degree of contact and control will be determining factors.¹⁰⁰ However, it may also be possible to connive by omission, so, for example, by failing to act knowing (or perhaps suspecting) that a person is bribing someone.

However, this is subject to the limitation that the senior officer in question must have a 'close connection' with the UK. A 'senior officer' includes a director, manager, secretary or "other similar officer of the body corporate"¹⁰¹ or a person purporting to act in such a capacity.¹⁰² This indicates that shadow directors and *de facto* directors are also included. From the perspective of a Brazilian company with a UK subsidiary that has committed an offence under sections 1, 2 or 6, it means that the prospect of a senior officer in the Brazilian parent company being personally liable is unlikely, unless he/she has a 'close connection' with the UK, where, for example, he is a British citizen or an individual habitually resident in the UK.¹⁰³

There is an additional, wider, offence under which an individual can be liable. Under UK law, it is an accessory offence to "aid, abet, counsel or procure the commission of any indictable offence."¹⁰⁴ The bribery offences and the offence of bribing a foreign public official constitute indictable offences for its purpose.¹⁰⁵ To be liable as an accessory, the person who committed the bribery offence does not need to have been charged or convicted, although as part of the case against an accessory the prosecution must be able to establish that a bribery offence has occurred.¹⁰⁶ Aiding and abetting the commission of an offence can include a failure to act.¹⁰⁷ Criminal jurisdiction can also have a trans-territorial effect where a substantial part of the conduct constituting the offence occurred in the UK.¹⁰⁸ There is no requirement that a person has a

'close connection' with the UK for this purpose, so it is possible to be liable as an accessory under the Bribery Act where most, but not necessarily all, of the constituent elements of the offence were committed in the UK.

Finally, under the Serious Crime Act 2007, it is an offence to intentionally encourage or assist in the commission of an offence.¹⁰⁹ The offence has extra-territorial application once the person committing them knows or believes that the anticipated offence might take place wholly or partly within the UK. Bribery is a 'serious offence' for the purposes of this legislation,¹¹⁰ so a person who makes funds available for use in a slush fund or drafts emails that he knows or believes could be used to bribe a foreign public official, commits an offence. His geographical location at the time when the bribery offence occurs is irrelevant.

3. Adequate Procedures

Considering the expansive application of the bribery offences and the possibility of a commercial organisation being liable for the offences of its employees and those otherwise associated with the organisation, it is essential to establish 'adequate procedures' in order for a company to comply with the provisions of the Bribery Act. Demonstrating that it has 'adequate procedures' in place is the only way in which an organisation will escape corporate liability under the legislation. To successfully rely on this defence, it is for the commercial organisation to prove, on the balance of probabilities, that it had implemented adequate procedures to combat bribery. The existence of adequate procedures and reliance on them as a defence are factors considered by prosecutors in deciding whether to pursue a prosecution where an act of bribery has taken place. A single instance of bribery does not necessarily indicate that an organisation's procedures are inadequate.¹¹¹

The Bribery Act required the Ministry of Justice to publish guidance indicating what procedures should be implemented.¹¹² The guidance is illustrative, rather than prescriptive. It identifies six core principles that a compliance regime should attempt to incorporate but which are not mandatory. They are proportionality, top-level commitment, risk assessment, due diligence, communication and monitoring and review.¹¹³ The guidance recognises that the nature of a compliance regime will vary, depending on the size of the organisation and the particular risks it faces. Every organisation will need to tailor its compliance

⁹⁸ Bribery Act, s. 14.

⁹⁹ Bribery Act, s. 14 (1).

¹⁰⁰ *R v Chaygor* [2008] UKHL 73, para. 33.

¹⁰¹ Bribery Act, s. 14 (4) (a).

¹⁰² Bribery Act, s. 14 (4) (b).

¹⁰³ Bribery Act, s. 12 (4).

¹⁰⁴ Accessories and Abettors Act 1861, s. 8.

¹⁰⁵ Bribery Act, s. 11 (2) (a), s. 11 (2) (b).

¹⁰⁶ Archbold: Criminal Pleading, 2011 ed., Evidence and Practice, London: Sweet & Maxwell, para. 18 Section III.F, para. 18-30.

¹⁰⁷ *Tack v Robo* [1970] 1 W.L.R. 741.

¹⁰⁸ *R v Smith (Wallace Duncan)* (4) [2004] 2 Cr App R 17.

¹⁰⁹ Serious Crime Act 2007, s. 44, 45.

¹¹⁰ Serious Crime Act 2007, Schedule 1, para. 9.

¹¹¹ Joint Prosecution Guidance, note 68, p. 11.

¹¹² Bribery Act, s. 9.

¹¹³ Ministry of Justice, note 63, p. 20.

procedures in response to the risks it identifies. However, the guidance states that organisations operating in foreign markets face higher risks.¹¹⁴ This observation is noteworthy because it implies that such organisations would be well advised to develop a more robust compliance regime as, in the view of the UK Ministry of Justice, they are more risk-prone. Organisations that are regulated¹¹⁵ by the Financial Services Authority¹¹⁶ must also comply with the financial crime rules¹¹⁷ and business principles contained in the FSA Handbook.¹¹⁸ For example, Aon Ltd was fined £5.25 million by the FSA for its failure to take reasonable care to implement and maintain anti-bribery controls.¹¹⁹

3.1. Proportionality

The first recommendation makes the point that all procedures should be proportionate. The guidance indicates that an organisation should tailor its procedures to meet the specific risks it faces. Designing these procedures involves an initial risk assessment across the organisation.¹²⁰ Assessing risk also involves examining the type of persons associated with the organisation. An example contained in the guidance where the risk would be assessed as high is a situation in which a third party is engaged by the organisation to negotiate with a foreign public official.¹²¹

There should be twin concerns, focusing on minimising the effects of specific, identified risks and preventing deliberate unethical by employees.¹²² The application of anti-bribery procedures to existing associated persons is more time consuming than applying procedures to new recruits or suppliers. The guidance advises that this process should be undertaken incrementally. An anti-bribery procedure should include a statement of commitment, a discussion of the organisation's approach to bribery risks and overview of the strategy adopted in response to identified risks. For example, in the case study contained in the guidance, a small to medium sized installation company, operating solely within the UK domestic market, relies on independent consultants. They help with business opportunities and they work on an "arms-length-fee-plus expenses

basis." The use of these consultants and monitoring their expenditure, which can involve cash transactions, is an area of potential risk for the organisation. To mitigate these risks, the guidance advocates issuing a policy statement about zero-tolerance of bribery to all consultants, employees, sectoral bodies and local chambers of commerce. The organisation should also perform due diligence on any consultants in its employment and assess any prospective employees. Further, the firm should incorporate a term into its contracts with these independent consultants that reflects the organisation's bribery procedure and defines what constitutes reasonable provision of hospitality. The contract should require a breakdown of expenses and the basis for remuneration.¹²³

3.2. Top-Level Commitment

The second principle put forward in the UK Ministry of Justice guidance relates to the need for top-level commitment. This means that those at the top of the organisation should be committed to preventing bribery and fostering this attitude generally. There should be formal communications, publicly available on the internet or intranet, which are publicised internally and externally. It should emphasise the organisation's commitment to a zero-tolerance bribery procedure and its commitment to a business model that encourages honesty and transparency.¹²⁴ This commitment should also extend to the provision of training for senior managers in conducting anti-bribery work and partnership with "relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies."¹²⁵

For instance, on deciding to enter into new or foreign markets with a high risk of bribery, senior management should assess the risks and develop fitting anti-bribery policies. These may include publishing a statement about bribery policy and anti-bribery procedures and the internal launch by senior management of a code of conduct for staff. Management should emphasise the importance of employee compliance with this code of conduct and a member of senior management should be tasked with overseeing compliance and dealing with any queries or issues that might arise.

3.3. Risk Assessment

Risk assessment involves the periodic assessment of challenges faced by the company in a manner that is 'informed' and 'documented'. Certain industries are more vulnerable or at risk of bribery, for example the telecommunication, extractive and defence industries. For these industries, risk assessment and management

114. *Ibid.*

115. i.e. financial services markets, exchanges and firms. See Financial Services and Markets Act 2000, Schedule 2.

116. Hereinafter the 'FSA'.

117. FSA Handbook, SYSC 6.3 Financial Crime, available at <<http://fsahandbook.info/FSA/html/handbook/SYSC/6/3>> (accessed 12 September 2011).

118. FSA Handbook, Prm 2.1, available at <<http://fsahandbook.info/FSA/html/handbook/Prm/2/1>> (accessed 8 September 2011).

119. Available at <<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml>> (accessed 12 September 2011).

120. Ministry of Justice, para. 1.2.

121. *Ibid.*, para. 1.2.

122. *Ibid.*, para. 1.2.

123. *Ibid.*, p. 34.

124. *Ibid.*, para. 2.3.

125. *Ibid.*, p. 24, para. 2.4.

will be an important facet of any anti-bribery procedure. Risk assessment informs the manner and scale of the anti-bribery procedures that an organisation will implement and there will be a degree of overlap between risk assessment and due diligence. Risk assessment procedures will usually be overseen by more senior level management and necessitate appropriate documentation of the risk and use of due diligence.¹²⁶ Risk assessment should also take into account external bribery risks such as high levels of corruption within a specific country or within a particular industry as well as internal risks generated by poor internal governance and oversight such as insufficient employee training and education or a failure to implement robust financial controls.¹²⁷

3.4. Due Diligence

The fourth guiding principle stresses the importance of due diligence. Proportionality and risk assessment are the cornerstones of due diligence. It is accepted that the appropriate level of due diligence will fluctuate with the corresponding assessment of risk.¹²⁸ The new corporate offence of failure to prevent bribery requires a more stringent assessment of persons who are 'associated' with the company.¹²⁹ Depending on the risk assessment, due diligence procedures implemented should include investigations, ongoing monitoring and interviews.¹³⁰ The presumption within the legislation that an employee is 'associated with' its employer means that it is in the best interests of an organisation to integrate due diligence and risk assessment procedures into its recruitment and human resources policies and procedures.¹³¹ The guidance demonstrates this principle in a number of case studies. For example, a medium to large sized specialist manufacturer has the chance to enter a new market in a foreign country, under a government contract to supply the state with equipment. The local law requires the company to operate through a local agent or intermediary and the company is concerned about ensuring that the risk of liability under the Act is reduced. In this instance the guidance advises that the organisation should thoroughly investigate and assess any potential candidates for the role as foreign intermediary. The organisation should compile a questionnaire and require disclosure of any "directorships held, existing partnerships and third party relationships and any judicial or regulatory findings."¹³² The organisation must verify any information it receives from the agent or intermediary and seek

clarification if necessary. Finally, the organisation should request the agent or intermediary to provide a full breakdown of the services it provides, costs, fees, commissions and the method of remuneration.¹³³

3.5. Communication

Effective communication and training is critically important in establishing bribery prevention policies. These policies should be publicised both internally and externally. Finally the guidance recommends establishing an internal confidential procedure through which concerns about bribery can be discussed.¹³⁴ This is similar to the familiar whistleblower procedure and equally, protection should be available for those who use it.¹³⁵

For example, consider the situation where a UK company wants to win a new contract in a foreign country that has been assessed as having a high risk of corruption. It employs a local agent and adviser to help with the process. To mitigate the risk of bribery, the company should inform all employees involved in the bidding process about its bribery policies. These terms should also be incorporated into the local agent's employment contract along with the right of termination if the company has cause to suspect bribery or corruption. The procedure on facilitation payments and corporate hospitality should be brought to the attention of all employees as well as penalties for violation. Finally, in this situation, the company may need to provide additional training to its employees, particularly those involved with negotiating with the foreign company.

3.6. Monitoring and Review

Finally, a commercial organisation should constantly monitor and review the procedures it has implemented and reassess and readjust in response to new risks. These assessments and reviews should be implemented at both an employee and management level. Staff surveys, questionnaires and feedback training can be indicators as to the effectiveness of the system as well as identifying any areas that could be improved. Equally, formal reviews and reports by management help foster an organisational culture in which bribery is unacceptable and reinforce top-level commitment to its prevention.¹³⁶

3.7. Relevance for Brazilian Companies

In light of these guiding principles and the desirability of establishing 'adequate procedures', Brazilian companies with a business connection in the UK

¹²⁶ *Ibid.*, p. 25, para. 3.3.

¹²⁷ *Ibid.*, p. 26, para. 3.6.

¹²⁸ *Ibid.*, p. 27, para. 4.3, 4.5.

must align existing compliance procedures with the UK Ministry of Justice guidance and ensure that new policies reflecting this guidance are implemented. The legislation is not intended to criminalise a company for the actions of one maverick employee. Assessing bribery risks and formulating appropriate anti-corruption procedures is the best way to inoculate a company against potential criminal liability under the Bribery Act.

Specific tasks should include a risk assessment to determine how best to formulate anti-bribery policies for a company which are effective and proportionate. The core values of accountability and transparency must inform all procedural decisions. This includes establishing and documenting the identities of all employees, shareholders, directors, senior management, subsidiaries, associated companies, suppliers and sub-contractors as well as establishing continuous monitoring and reviews. Record keeping and accounting practices must also be subject to regular audits.¹³⁷

Reviews and audits of a compliance programme should be clearly communicated throughout the organisation to business partners, the general public and internally amongst employees, agents and subsidiaries. The non-governmental organisation, Transparency International, emphasises that any anti-corruption programme developed must comply with the relevant bribery laws of countries within which the organisation has a presence. Therefore, providing a clear explanation on relevant local laws to employees, agents and subsidiaries as well as establishing guidelines to follow is vital. This training and communication are key principles identified in the UK Ministry of Justice guidance.

Brazilian companies need to focus their anti-corruption procedures on the most pressing commercial risks, but an organisation should also not lose sight of less prevalent types of bribery, including political contributions. For example, a company should disclose all its political contributions.¹³⁸ GC 100, which is an organisation whose members are group counsel for companies listed on the UK's FTSE 100, emphasises the importance of a 'top-down' attitude towards bribery prevention from the board of directors and senior management. To facilitate this task, a member of senior management should be responsible for overseeing the implementation of the compliance programme.¹³⁹ The Chief Executive Officer should also ensure that the programme establishes clear lines

of authority, to encourage greater accountability and a wider understanding of the programme itself.¹⁴⁰

The suggestions made by Transparency International and GC 100 are instructive, particularly in relation to supply chain management. Where a Brazilian company has a number of subsidiaries or sub-contractors, it should implement 'procurement and contract management procedures' to reduce the risk of bribery within the supply chain.¹⁴¹ Furthermore, the organisation should inform any contractors or suppliers about its anti-bribery policies and should those parties act in a manner inconsistent with those policies, the organisation should reserve the right to terminate the relationship.¹⁴²

Human resource and employment policies will also have to adapt to new anti-bribery initiatives. Upon joining a company, employees must be aware of the organisation's attitude towards bribery, what constitutes bribery and the sanctions that accompany a breach of the organisation's anti-corruption procedures. When recruiting, an employer should assess whether there is a need to carry out additional background checks and must ensure that training on anti-bribery policies are made a component of all induction courses for new recruits.

Finally, considering that corporate hospitality and facilitation payments can give rise to an offence or offences under the Act, an organisation should have clear guidance in place for employees to follow should the need arise. This includes a factor that would be considered by the Serious Fraud Office when deciding whether to prosecute.¹⁴³ Transparency serves as a litmus test for probity, and in terms of record keeping, Brazilian companies are well advised to keep an easily accessible register of all instances where corporate hospitality has been afforded. In the unhappy event that a facilitation payment has to be made, again, this should be recorded, with a detailed note containing a full explanation as to the circumstances in which the payment was made and all efforts undertaken to avoid this eventuality having occurred.

4. Penalties

In order to be prosecuted for offences under the Bribery Act, the consent of the Director of the Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs (now incorporated into the Crown Prosecution Service) must be obtained.¹⁴⁴

137. Transparency International, Business Principles for Countering Bribery - A Multi-Stakeholder Initiative, 2009, 2nd ed., para. 5.7.1 (*available at* <http://www.transparency.org/global_priorities/private_sector/business_principles> (accessed 8 September 2011)).

138. *Ibid.*, para. 4.2.2.

139. Lord Bach Letter entitled 'Advocates' Provisions' Guidance December 2009 *available at*

140. Transparency International, note 137, para. 5.1.2.

141. Lord Bach letter, note 138, p. 4.

142. Transparency International, note 137, para. 5.2.4.3-5.2.4.4.

143. Joint Prosecution Guidance, note 68, p. 9.

Section 11 provides for the penalties for breach of the Bribery Act. An individual guilty of an offence under sections 1, 2 or 6 is liable to a maximum sentence of imprisonment for a term not exceeding ten years, or to an unlimited fine, or to both. Similarly, an organisation is liable to pay an unlimited fine if convicted of a bribery offence or the section 7 offence on indictment.

Upon conviction for an offence under the Bribery Act,¹⁴⁵ an individual or a corporate will be subject to a criminal confiscation order. The effect of a criminal confiscation order is to recover any benefit¹⁴⁶ from the individual or company which was obtained from criminal conduct. This can lead to the confiscation of the entirety of the value derived from the illegally obtained contract.

An additional, and highly significant, consequence of conviction for an offence under the Bribery Act is the prohibition against a company from tendering for government contracts. The legislation governing public procurement was amended by the Bribery Act¹⁴⁷ and conviction for bribery renders a company or its directors ineligible for selection.¹⁴⁸

The first UK prosecution for a case of overseas corruption occurred in 2009 when engineering firm Mabey & Johnson was fined £6.6 million for both overseas corruption and breach of UN sanctions.¹⁴⁹ The firm inflated the price of contracts to disguise the provision of illegal kickbacks to the Iraqi government, in breach of UN sanctions. The firm also admitted corruption offences in Ghana and Jamaica. Two former directors of the firm were fixed with individual criminal liability.¹⁵⁰

Under Part 5 of the Proceeds of Crime Act 2002,¹⁵¹ there is the possibility of civil recovery of property that is derived from or represents property obtained through unlawful conduct.¹⁵² Increasingly, the Serious Fraud Office has been using this power in bribery cases to penalise a company instead of prosecuting the company in question. In these cases, if there is clear evidence of knowledge of the bribe on the part of a director or senior employee, the Serious Fraud Office will commence criminal proceedings against them as well as pursuing civil recovery against the company.

145. Proceeds of Crime Act 2002, s.6 (2) (a).

146. Proceeds of Crime Act 2002, s. 6 (4).

147. Public Contracts Regulations Act 2006 as amended by Bribery Act (Consequential Amendments) Order 2010.

148. Public Contracts Regulations 2006, Regulation 23 (1) (ca).

149. SFO Press Release, "Mabey & Johnson Ltd sentencing", 25 September 2009, available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey-johnson-ltd-sentencing.aspx> (accessed 16 September 2011).

150. SFO Press Release, "Mabey & Johnson directors made illegal payments to Saddam Hussein's Iraq to gain contract", 10 February 2011, available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mabey-johnson-directors-made-illegal-payments-to-saddam-hussein-s-iraq-to-gain-contract.aspx> (accessed 16 September 2011).

151. Her Majesty's Stationery Office, POCA 2002.

Property can be recovered in a civil recovery action regardless of whether the person in possession of the property committed the unlawful conduct.¹⁵³ Thus, third parties who receive payment under a contract that is obtained illegally can be subject to civil recovery. The Serious Fraud Office first exercised this power against construction firm Balfour Beatty Plc which notified the Serious Fraud Office of accounting irregularities within a subsidiary entity. These irregularities related to a construction project which was undertaken by a subsidiary entity as part of a joint venture in Egypt seven years previously. Balfour Beatty Plc made a settlement payment of £2.25 million.¹⁵⁴

There is also the possibility that payment of a facilitation fee or payments received under a contract obtained by bribery could engage the money laundering offences contained in the POCA 2002. Criminal property is the benefit a person obtains from criminal conduct.¹⁵⁵ There will be cases where a contract obtained by way of facilitation payments and bribery falls to be treated as criminal property for this purpose. An offence is committed where a person conceals, disguises, converts, transfers or removes criminal property from the UK and fails to disclose this.¹⁵⁶ The best course of action if a company comes to realise that it may have benefitted in some way from any offence is to make a disclosure to the UK's Serious Organised Crime Agency. For companies operating in the financial sector, it is necessary to notify the FSA of any suspicion of bribery.¹⁵⁷

The Serious Fraud Office has issued guidance which encourages companies to report overseas corruption.¹⁵⁸ While there is no requirement of self-referral to the Serious Fraud Office, by self-referral an organisation minimises the likelihood of a criminal investigation and prosecution.¹⁵⁹

153. POCA 2002, s. 242 (1).

154. SFO Press Release, "Balfour Beatty Plc", 6 October 2008, available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx> (accessed 16 September 2011).

155. POCA 2002, s. 340 (3).

156. POCA 2002, s. 327, s. 328, s. 329.

157. FSA Handbook, Sup. 15 available at <http://fsahandbook.info/FSA/html/handbook/SUP/15/35>

158. "Approach of the SFO to dealing with Corruption", available at <http://www.sfo.gov.uk/press-releases/press-releases-2011/mabey-johnson-directors-made-illegal-payments-to-saddam-hussein-s-iraq-to-gain-contract.aspx> (accessed 8 September 2011).

159. *Ibid.*