



*The significance for Danish and Global Businesses of
U.K. and U.S. Anti-Bribery Regulation & Enforcement*

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The significance of the UK Bribery Act 2010 and US Foreign Corrupt Practices Act for Danish and Global Businesses of Anti-Bribery Regulation & Enforcement

- ❖ Introduction – bribery risks and recent UK/US/international enforcement.
- ❖ Significance of the FCPA and the UK Bribery Act 2010.
- ❖ UK Bribery Act – key provisions.
- ❖ Significance of the UK Bribery Act.
- ❖ US Foreign Corrupt Practices Act (“FCPA”) – key provisions.
- ❖ Hypothetical scenarios and analysis.
- ❖ Application to small and medium-sized enterprises.
- ❖ Whistleblowing.
- ❖ “Red flags” and compliance.

Introduction – bribery risks

- ❖ Risks associated with some of the jurisdictions in which some of Denmark’s largest organisations are doing business.
- ❖ Source: *Transparency International Corruption Perceptions Index 2010* - an **annual index of 178 countries, indicating the perceived level of public-sector corruption** in a country/territory: (<http://www.transparency.org>). Used as a reference by regulators and companies, the index lists a country's ranking and score, the number of surveys used to determine the score, and the confidence range of the scoring. CPI Score: on a scale of one to ten, how one country compares to others; CPI Ranking: out of 178 countries (CPI Rank 178 being the country perceived to be the most corrupt).

COUNTRY	CPI 2010 SCORE	CPI 2010 RANK
Denmark	9.3	1
Sweden	9.2	4
South Africa	4.5	54
Turkey	4.4	56
Brazil	3.7	64
China	3.5	78
Nigeria	2.4	134
Russia	2.1	154
Uzbekistan	1.6	172

Introduction – recent UK enforcement

Significant enforcement activity by the UK authorities since late 2008

- ❖ **DePuy International Limited:** the Serious Fraud Office (“SFO”) obtained a Civil Recovery Order pursuant to which the company will pay £4.829 million, plus prosecution costs, in recognition of unlawful conduct relating to the sale of orthopaedic products in Greece (In May 2010 the “whistleblower” in this case was jailed for 12 months for his part in the corruption, a sentence later suspended by the Court of Appeal). (April 2011)
- ❖ **M.W. Kellogg Limited:** to pay £7 million in recognition of sums it is due to receive which were generated through the criminal activity of MWKL's parent company and others. (February 2011)
- ❖ **BAE Systems Plc:** fined £500,000 after admitting it had failed to keep adequate accounting records in relation to a defence contract for the supply of an air traffic control system to the Government of Tanzania. Part of a £30m global agreement with the SFO and the US Department of Justice concerning contracts in a number of countries. Additionally, BAE was ordered to pay £225,000 costs to the SFO. (December 2010)
- ❖ **Julian Messent:** sentenced to 21 months' imprisonment for making or authorising corrupt payments to Costa Rican officials in the state insurance company and the national electricity and telecommunications provider. Ordered to pay £100,000 compensation within 28 days to Costa Rica or serve an additional 12 months imprisonment if he failed to do so. (October 2010)

Introduction – recent UK enforcement

- ❖ **Innospec**: US\$12.5m fine (part of US\$40m global settlement). Joint US/UK compliance monitor for three years. (March 2010)
- ❖ **Alstom**: directors arrested, and later released, in corruption investigation following raids. (March 2010)
- ❖ **Amec plc**: £5m Civil Recovery Order and compliance monitor. (October 2009)
- ❖ **Mabey & Johnson Ltd**: £6.6m fine and compliance monitor. (September 2009)
- ❖ **Nigel Heath**: 6 month sentence for former UK solicitor found guilty of conspiracy to bribe US Attorney General or other US government law enforcement officers. (October 2008)
- ❖ **Balfour Beatty**: £2.25m Civil Recovery Order and compliance monitor. (October 2008)
- ❖ **CBRN Team Ltd**: employee and an official of Uganda received a suspended sentence and 12 months imprisonment, respectively, in relation to bribery charges stemming from a scheme in which CBRN paid the Ugandan official in order to receive a contract to advise the Ugandan Presidential Guard. (September 2008)
- ❖ UK regulators cannot *impose* a **compliance monitor**, but it is becoming a feature of most UK settlements.

Introduction – recent US enforcement

❖ *Top US enforcement priority*

- All of the 10 largest U.S. Foreign Corrupt Practices Act (“FCPA”) settlements have occurred since 2008.
- 8 of the top 10 settlements were non-U.S. companies.
- Additional dedicated enforcement resources.
- Increased use of industry-wide investigations.

Introduction – recent US enforcement

❖ Top Ten Corporate FCPA Penalties

- **Siemens** (Germany): \$800 million in 2008.
- **KBR/Halliburton** (U.S.): \$579 million in 2009.
- **BAE** (U.K.): \$400 million in 2010.
- **Snamprogetti Netherlands B.V./ENI S.p.A.** (Holland/Italy): \$365 million in 2010.
- **Technip S.A.** (France): \$338 million in 2010.
- **JBC Corporation** (Japan): \$218.8 million in 2011.
- **Daimler AG** (Germany): \$185 million in 2010.
- **Alcatel-Lucent** (France): \$137 million in 2010.
- **Panalpina** (Switzerland): \$81.8 million in 2010.
- **Johnson & Johnson** (U.S.): \$70 million in 2011.

Introduction – recent US enforcement

❖ Individual Penalties

- **William Jefferson:** 13 years in prison, \$470,000 forfeited.
 - ❖ Former US Congressman, convicted of bribery and related charges, including conspiracy to violate the FCPA.
- **Charles Jumet:** 7.25 years in prison, \$15,000 fine.
 - ❖ Pleaded guilty for conspiracy to violate the FCPA and making false statements to federal law enforcement officials.
- **Frederic Bourke, Jr.:** 366 days in prison, 3 years of supervised release, \$1 million fine.
 - ❖ Convicted of conspiracy to violate the FCPA and Travel Act, and making false statements to federal law enforcement officials
- **Albert “Jack” Stanley:** Faces 7 years in prison and \$10.8 million in restitution.
 - ❖ Alleged to have authorized hiring of agents to make bribes to Nigerian government officials.

Introduction – recent international enforcement

- ❖ Significant cases involving international regulatory co-operation: eg BAe, Innospec, Siemens.
- ❖ Co-operation, exchange of information, and discussion between international regulators about when and where to prosecute companies and individuals, is now a reality.
- ❖ Prosecution is not limited to the US and UK:
 - **World Bank**: banned Macmillan Publishers from bidding for any of its contracts for six years in relation to bribery payments to an official in Sudan in an unsuccessful attempt to secure a multi-million pound contract for an education project. (May 2010)
 - **China**: four employees of Rio Tinto, including an Australian citizen, sentenced to between 7 and 14 years for accepting bribes and stealing commercial secrets in China. (March 2010)
 - **Germany**: Siemens fined US\$814m (part of a US\$1.6bn global settlement) by Munich prosecutors for bribery and corruption offences. (December 2009)
 - **Japan**: four former senior executives from Pacific Consultants International pled guilty to violating Japan's Unfair Competition Prevention Law which prohibits bribes to foreign government officials. (November 2008)

Bribery Act 2010 - what has changed?

- ❖ The existing framework is a “patchwork” of common law and statutory offences largely dating back to the start of the 20th century (for example, the Prevention of Corruption Act 1906 and 1916).
- ❖ The UK Bribery Act 2010 was passed in April 2010 and originally scheduled to come into force April 2011.
- ❖ The Act will now come into force on 1 July 2011.
- ❖ Until then, **the existing framework of laws remains in place**. Before implementation of the new Act, businesses should examine their anti-bribery and corruption procedures to ensure that they will not fall foul of the Act.

Bribery Act key provisions

Offences:

- ❖ Giving, promising or offering a bribe
- ❖ Requesting, agreeing to receive or accepting a bribe
 - Bribing another person by giving, promising or offering a bribe (a “financial or other advantage”).
 - Where the briber intends to bring about or reward improper performance of a function or activity, or knows or believes that the receipt of the bribe in itself amounts to improper performance.
 - Whether or not the party in fact receives a bribe, and including bribes routed through a third party or agent.
 - Where there is an expectation that dealings are to be carried out in good faith or impartially, and where the person performing the function is in a position of trust.
 - *Note the requirement of an intention to bring about or reward improper performance.*

Bribery Act key provisions

Offences:

❖ *Offence of bribing foreign public officials*

- Includes officials from government, public agencies, international organisations and judiciary, even if the bribe is paid to a third party at the request of the foreign public official.
- The briber must intend to influence the recipient and to obtain or retain business or a business advantage.
- Includes influencing a public official to omit to exercise a function or to use his position even where such use is outside the scope of the official's capacity.
- The Bribery Act does not permit facilitation payments.
- *Note the requirement of an intention to influence and obtain or retain a business advantage.*

Senior officer liability

- If any of these offences above are committed by a body corporate with the “consent or connivance” of a senior officer or someone purporting to act in that capacity, the senior officer will also be liable for that offence.

Bribery Act key provisions

Offences:

- ❖ **Corporate offence of failing to prevent bribery**
 - A “commercial organisation” commits an offence of bribery where a **person associated** with it bribes another person intending to obtain or retain business, or an advantage in business, for the organisation.
 - It is a defence to show that “**adequate procedures**” have been put in place to prevent bribery by those associated with the organisation.

Bribery Act key provisions

- ❖ “Associated persons”:
 - A person is associated with a commercial organisation if they “perform services for or on behalf of” the organisation.
 - The capacity in which the person performs services on behalf of the commercial organisation does not matter.
 - An associated person “may (for example)” be the commercial organisation’s “employee, agent or subsidiary”.
 - The definition of associated person has been left deliberately wide and could potentially cover more loosely connected parties (e.g. franchisees, authorized dealers, JV partners, members of consortia).
 - May even include parties with whom there is no contractual relationship.
 - The UK government sought to ensure that compliance procedures impact on a wide range of associated persons.
 - The Court will look at all of the relevant circumstances, including but not limited to the nature of the relationship between the commercial organisation and the bribe payer.

Bribery Act key provisions

- ❖ Significance of “associated persons”:
 - A commercial organisation may face liability for the corrupt activities of a person associated with it if the person “performs services for or on behalf of” the organisation. Examples include:
 - ❖ Franchisees.
 - ❖ Joint Venture Partners.
 - ❖ Subsidiaries.
 - ❖ Employees.
 - ❖ Agents
 - ❖ Syndicates.
 - ❖ Intermediaries.
 - Examine the extent to which company compliance procedures are or may be imposed on associated persons.
 - Ensure that compliance procedures apply consistently throughout the group.

Bribery Act key provisions

Defence to the corporate offence

- ❖ It is a defence to the corporate offence if a commercial organisation has in place “adequate procedures” to prevent bribery and corruption.
- ❖ Requires companies to be **proactive**.
- ❖ On 31 March 2011, the Ministry of Justice published Guidance intended to assist businesses to interpret the Act and implement “adequate procedures”.

Bribery Act key provisions

- ❖ Who does the Act apply to?
- ❖ Giving or receiving a bribe or bribing a foreign public official
- ❖ An offence under sections (1), (2) or (6) (i.e. giving, promising or offering a bribe; requesting, agreeing to receive or accepting a bribe; or bribing a foreign public official) will be committed in England & Wales, Scotland & Northern Ireland if any act or omission which forms part of the offence takes place in that part of the UK.
- ❖ It is also an offence where the relevant act/omission is done or made outside of the UK but the act/omission would form part of an offence if done in the UK and that person is “closely connected” with the UK.
- ❖ A person has a “close connection” with the UK if at the time the acts or omissions were done or made the person was:
 - a British citizen,
 - a British overseas territories citizen,
 - a British National (Overseas),
 - a British overseas citizen,
 - a person who under the British Nationality Act was a British subject,
 - a British protected person within the meaning of that Act,
 - an individual ordinarily resident in the UK,
 - a body incorporated under the law of any part of the United Kingdom,
 - a Scottish partnership.

Bribery Act key provisions

- ❖ Who does the Act apply to?
- ❖ Corporate offence
- ❖ The corporate offence (section 7) is committed by a relevant commercial organisation **irrespective of whether acts or omissions forming part of the offence take place in the UK.**
- ❖ For the purposes of the corporate offence, a “relevant commercial organisation” is:
 - A body which is incorporated under the law of any part of the UK, or partnership which is formed under the law of any part of the UK, and which carries on business (whether in the UK or elsewhere).
 - **Any other body corporate (wherever incorporated), or partnership (wherever formed) which carries on a business, or part of a business, in any part of the UK.**
- ❖ The fact that a foreign corporate conducts a part of its business (for example through a subsidiary, operations or an office) in the UK may give UK prosecutors and courts jurisdiction.

Bribery Act key provisions

Penalties

- ❖ Significant penalties for both **businesses and individuals**.
- ❖ A **body corporate** guilty of an offence will be subject to an **unlimited fine**.
- ❖ An **individual** found guilty of an offence will be subject to an **unlimited fine** or to a jail sentence of up to **10 years**, or to **both**.

Bribery Act key provisions

UK government Guidance

- ❖ On 31 March 2011 the UK Ministry of Justice published guidance to assist businesses to interpret the Act and establish “adequate procedures” to prevent bribery.

- ❖ Who does the Act apply to?
 - The Guidance suggests that in relation to the prosecution of the corporate offence of failing to prevent bribery the focus will be on organisations which have a “demonstrable business presence in the UK”.
 - ❖ According to the Guidance, the trading of a non-UK company’s shares on the London Stock Exchange, or the simple fact of having a UK subsidiary, would not, in themselves, be enough to amount to carrying on business in the UK.

 - ❖ However, it will be for the UK courts to determine whether an organisation ‘carries on a business’ in the UK, taking into account particular facts in individual cases.

Bribery Act key provisions

UK government Guidance

- ❖ “Associated persons”
 - The Guidance appears to have **restricted the scope of potential liability of commercial organisations for the activities of “associated persons”** and draws certain distinctions:
 - ❖ “Associated persons” can include contractors and suppliers of goods and services, to the extent that they are said to be performing services on behalf of an organisation.
 - ❖ The Guidance suggests that a commercial organisation benefiting indirectly, through its investment or ownership, from a bribe paid by an employee or agent of a joint venture entity on behalf of that entity, is unlikely to be liable under the Act.
 - ❖ In the context of the potential liability of parent companies for the offences of a subsidiary, “liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent”.

Bribery Act key provisions

UK government Guidance

- ❖ “Adequate procedures”
 - Businesses should adopt a “**risk-based approach**” in establishing “**adequate procedures**” as a defence to the corporate offence.
 - Six high-level, non-prescriptive principles should inform organisations establishing procedures:
 1. **Proportionate procedures**: Businesses should have clear policies and procedures to prevent corrupt activity, proportionate to risk.
 2. **Top level commitment**: Senior management should support their business’ anti-corruption regime.
 3. **Risk assessment**: Businesses will need to assess potential internal and external risks of bribery and corruption.
 4. **Due diligence**: Businesses should have due diligence procedures covering all parties to a business relationship, including supply chain, agents etc.
 5. **Communication (including training)**: Policies and procedures should be communicated effectively throughout the organisation and externally.
 6. **Monitoring and review**: Businesses should conduct internal checks and periodically review the effectiveness of their anti-bribery policies.

Bribery Act key provisions

UK government Guidance

- ❖ “Adequate procedures”
 - Procedures should be “proportionate to risk” which will be linked to the **size, nature and complexity** of an organisation.
 - The Guidance recognises that the application of adequate procedures retrospectively to existing associated persons will be difficult, but this “should be done over time”.
 - Businesses should adopt a risk-based approach with “due allowance for what is practicable and the level of control over existing arrangements”.

Bribery Act key provisions

UK government Guidance

- ❖ Hospitality
 - The UK government will not seek to use the Act to prohibit “reasonable and proportionate” hospitality and promotional or other similar business expenditure:
 - ❖ an invitation to a sporting event, for example, “as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field is extremely unlikely to amount to an offence .
- ❖ Facilitation payments
 - Facilitation payments are not exempt under the Act, unlike under the US Foreign Corrupt Practices Act.
 - ❖ Although the UK government recognises that the complete eradication of facilitation payments is a long-term objective, prosecution remains a possibility.
- ❖ Commercial organisations in the UK and overseas, and their senior management, particularly those operating in high risk jurisdictions and sectors, should seek to establish appropriate compliance procedures to deal with bribery risks and to mitigate potential liability under the Act well in advance of 1 July 2011.

Significance of the Bribery Act

Material differences between the FCPA and the Bribery Act:

- ❖ Unlike the FCPA, the Bribery Act 2010 **does not allow “facilitating payments”**.
- ❖ The Bribery Act 2010 applies to corrupt dealings between **private companies** and **private individuals**, as well as dealings with governments and public sector entities.
- ❖ The Bribery Act 2010 **extends criminal liability to the receiver of the bribe, as well as the giver of the bribe**, unlike the FCPA.
- ❖ The Bribery Act 2010 does not include an FCPA-style “books and records” offence, but UK businesses are subject to requirements for accurate accounting provisions contained in other legislation, including the Companies Act 2006.

Significance of the Bribery Act

Significant jurisdictional reach of the Bribery Act beyond the UK

- ❖ Giving a bribe, receiving a bribe, or bribing a public official
Includes acts or omissions made or done outside of the UK, but which would amount to an offence if committed in the UK, and made or done by a person **closely connected** with the UK (e.g., a British national; a company incorporated in the UK).
- ❖ Strict liability corporate offence of failing to prevent bribery by an associated person
Potential corporate liability of a body corporate or partnership, wherever formed, which carries on a business, or part of a business, in any part of the UK, **irrespective of where the act or omission takes place**.
- ❖ However, Guidance published by the UK government in March 2011 suggests that the jurisdictional reach of the Act may be narrowed in practice.

Significance of the Bribery Act

“Associated persons”

- ❖ Significant scope of “associated persons” means **potential liability of international businesses** for the corrupt activities of corporate and individuals performing services on their behalf.
- ❖ Businesses should look critically at “associated persons”:
 - Identify associated persons.
 - Examine the extent to which compliance procedures are or may be imposed on them.
 - Ensure that compliance procedures apply consistently throughout the global corporate group.
- ❖ Compliance programmes limit issues, make it easier to detect issues, and ensure issues are appropriately dealt with if/when they arise.
- ❖ However, Guidance published by the UK government in March 2011 suggests that the potential scope of “associated persons” may be limited in certain circumstances.

Significance of the Bribery Act

- ❖ “Whistleblowing”
- ❖ The UK Bribery Act 2010 does not contain any provisions for the reward of whistleblowers.
- ❖ Section 922 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act provides that whistleblowers who assist the SEC by voluntarily providing information about an FCPA violation may be awarded between 10% and 30% of any monetary sanctions over US\$1m the SEC imposes upon a company.
- ❖ The UK position:
 - The UK Bribery Act 2010 does not contain any provisions for the reward of whistleblowers.
 - Bribery Act 2010 seeks to encourage cultural change within businesses: a “top-down approach”.
 - Will the whistleblowing provisions of Dodd-Frank make that change redundant?

Who does the FCPA apply to?

❖ **Anti-bribery provisions apply to:**

- All U.S. companies, citizens, or residents, whether or not they act within or outside of the United States.
- All companies listed on the U.S. stock exchanges or subject to SEC reporting requirements.
- All companies or individuals who execute any part of a bribery scheme from within the United States.
- All officers, directors, employees, or agents of the above.

❖ **Accounting provisions apply to:**

- “Issuers,” which are companies with securities registered in the US or that file periodic reports with the Securities and Exchange Commission.
- Non-US subsidiaries of issuers are not bound directly by these provisions, but the parent must in good faith use its influence to cause subsidiary to devise and maintain efficient accounting controls.

FCPA key provisions

- ❖ **Key elements** of an anti-bribery violation:
 - Offer, promise, or payment;
 - To a **foreign official**;
 - Made with **corrupt intent**; and
 - To assist in **obtaining** or **retaining** business or **directing** business to any person.

FCPA key provisions

- ❖ Element 1: **Offer, promise, or payment**
 - Money;
 - Anything else of value (e.g., tuition, loan, travel upgrades, dinner, entertainment);
 - Gift (e.g., holiday bottle of scotch or champagne);
 - Charitable contribution or donation (e.g., donation to foreign official's wife's charity);
 - In-kind service.

- ❖ Element 2: **Foreign Official**
 - Any officer or employee of:
 - ❖ Any government, whether national, state, provincial or local;
 - ❖ Any department, instrumentality, or agency of a foreign government (e.g., the Ministry of Energy, the Customs service);
 - ❖ Any state-owned or controlled company (e.g., a state oil company or state-controlled utility) ;
 - ❖ Any non-U.S. political party;
 - ❖ Any public international organization (e.g., United Nations).
 - Any candidate for non-U.S. political office.

FCPA key provisions

- ❖ Element 3: **Corrupt intent**
 - Intent to induce the foreign official to misuse his/her official position.
 - The intent to make the payment is relevant; not the intent to violate the FCPA.
 - ❖ Even if an agent or employee claims he did not know about the FCPA, the company and the individual may still be held criminally liable.

- ❖ Element 4: **Business purpose**
 - Payment, promise, or offer of thing of value must be made to assist in.
 - ❖ Obtaining business;
 - ❖ Retaining business (loosely defined); or
 - ❖ Directing business to any person or entity.
 - This, too, is very broadly construed.
 - ❖ Covers payments to assist in obtaining or retaining business indirectly, such as reducing taxes or customs duties, thereby lowering a company's overall expenses in a particular market.
 - ❖ Applies to any business, not just business with government customers (i.e. payment to antitrust official to approve a merger between two private companies may be an FCPA violation).

FCPA key provisions

❖ Facilitating Payments Exception

- Made to secure “routine governmental action”.
- Must be small, reasonable, and well-documented.
- Many local laws prohibit them.
- Examples include:
 - ❖ Obtaining copies of permits, licenses, official documents.
 - ❖ Processing governmental papers (e.g., visas)
 - ❖ Providing police protection.
 - ❖ Delivering mail.
 - ❖ Providing utilities (phones, power, water).
 - ❖ Scheduling inspections.

❖ Two further limited exceptions

- Payment is a “reasonable and bona fide expenditure” to demonstrate or promote a product or execute a contract.
- Payment is lawful under foreign country’s written laws.

Hypothetical scenarios

- ❖ Scenario 1: A contractor requests that “Danish Company ApS” fly him to visit one of their operations.
- ❖ Scenario 2: A “Danish Company ApS” employee, a UK national living in the Philippines, makes a payment to the CEO of a contractor in order to secure a meeting with a local official.
- ❖ Scenario 3: A UK-national executive of “Danish Company ApS” invites a prospective contractor to take up a ticket to see the Champions League final. The executive later offers to pay for business-class flights and 5-star accommodation for the contractor, in addition to the ticket. The executive then offers to extend the invitation to the contractor’s son.
- ❖ Scenario 4: A “Danish Company ApS” employee, a Danish national, pays a local official in Angola in order to secure approval for new operations.
- ❖ Scenario 5: A “Danish Company ApS” employee, a non-UK national but ordinarily resident in the UK, pays US\$200 dollars to a local customs official to ensure that a customs stamp is obtained in a timely fashion.

Hypothetical scenarios – an analysis

Scenario 1: *A contractor requests that “Danish Company ApS” fly him to visit one of their operations.*

UK analysis

- Does “*Danish Company ApS*” fulfil the jurisdictional test of the Bribery Act?
- By paying for the flight is “*Danish Company ApS*” “giving, promising or offering a bribe?” Is it an offer of something of value Does it amount to offering a “financial or other advantage”?
- Does “*Danish Company ApS*” intend to bring about or reward improper performance by the contractor of his function or activity?
- Does “*Danish Company ApS*” know or believe that the receipt of the flight would in itself amounts to improper performance?

Hypothetical scenarios – an analysis

Scenario 1 (cont.): *A contractor requests that “Danish Company ApS” fly him to visit one of their operations.*

❖ **Issues for “Danish Company ApS”**

- Transparency and record-keeping is the key.
- Record the reasons for the visit.
- Establish and record the business reasons for the contractor’s visit.
- Ensure payments are made through the proper channels.
- Establish a mechanism for the approval and review of such trips.
- Avoid ‘per diem’ expenses during the visit.

Hypothetical scenarios – an analysis

Scenario 2: A “Danish Company ApS” employee, a UK national living in the Philippines, makes a payment to the CEO of a contractor in order to secure a meeting with a local official.

UK analysis

❖ **Potential offence: employee**

- Offence of giving, promising or offering a bribe (a “financial or other advantage”, with intent to bring about or reward improper performance).
- An offence where the act is done or made outside of the UK but the act/omission would form part of an offence if done in the UK and that person is “**closely connected**” with the UK. “Close connection” **includes British nationals**.

❖ **Potential offence: “Danish Company ApS”**

- Potential exposure for acts or omissions done or made outside of the UK by “**associated persons**” by virtue of “Danish Company ApS”, a non-UK company, carrying on business, or part of its business in the UK.
- The corporate offence is committed by a relevant commercial organisation **irrespective of whether acts or omissions forming part of the offence take place in the UK**.

❖ **Issues for “Danish Company ApS”**

- “Danish Company ApS” has a defence to the corporate offence if it can show that it has in place “**adequate procedures**” to prevent bribery within the organisation.

Hypothetical scenarios – an analysis

Scenario 3: *A UK-national executive of “Danish Company ApS” invites a prospective contractor to take up a ticket to see the Champions League final. The executive later offers to pay for business-class flights and 5-star accommodation for the contractor, in addition to the ticket. The executive then offers to extend the invitation to the contractor’s son.*

UK analysis

- **Guidance**
 - ❖ It is not the government’s intention to prosecute cases of “reasonable and proportionate” hospitality.
 - ❖ An invitation to a sporting event, for example, “as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field is extremely unlikely to amount to an offence”.
 - ❖ Unlikely to be evidence of an intention to induce improper performance by the recipient of the hospitality.
 - ❖ However, an invitation to family members to take advantage of luxury hospitality will raise concerns.

Hypothetical scenarios – an analysis

Scenario 3 (continued):

❖ **Issues for “*Danish Company ApS*”**

- Potential exposure under the UK Act for acts or omissions done or made by “associated persons” if “*Danish Company ApS*” carries on business, or part of its business in the UK.
- The corporate offence is committed by a relevant commercial organisation irrespective of whether acts or omissions forming part of the offence take place in the UK.
- Does “*Danish Company ApS*” have a “demonstrable business presence in the UK”?
 - ❖ A London listing or simply having a UK subsidiary may not, in themselves, be sufficient to bring “*Danish Company ApS*” within the scope of the corporate offence.
 - ❖ Having an office or operations in addition to a listing in the UK is likely to bring “*Danish Company ApS*” within the scope of the Act.
 - ❖ This remains subject to judicial interpretation.

Hypothetical scenarios – an analysis

Scenario 3 (continued):

❖ **Issues for “*Danish Company ApS*”**

- “*Danish Company ApS*” has a defence to the corporate offence under the UK Act if it can show that it has in place “adequate procedures” to prevent bribery within the organisation.
- “*Danish Company ApS*” should have in place and enforce a clear gifts and hospitality policy, in line with the six high-level principles.
- For example, there should be top-level commitment to the policy, which should be effectively communicated throughout the company and subject to monitor and review.
- The FCPA demands similar compliance programmes to prevent and detect bribery.

Hypothetical scenarios – an analysis

Scenario 4: A “Danish Company ApS” employee, a Danish national, pays a local official in Angola in order to secure approval for new operations.

UK analysis

- **Potential offence: employee**
 - ❖ The employee does not fall within the Act due to having no “close connection” to the UK.
- **Potential offence: “Danish Company ApS”**
 - ❖ Potential exposure for acts or omissions done or made outside of the UK by “associated persons” to the extent that “Danish Company ApS”, a non-UK company, carries on business, or part of its business in the UK.
 - ❖ The corporate offence is committed by a relevant commercial organisation irrespective of whether acts or omissions forming part of the offence take place in the UK.
 - ❖ The corporate offence does not require that the underlying act is committed by a party with a close connection to the UK.
- **Issues for “Danish Company ApS”**
 - ❖ “Danish Company ApS” has a defence to the UK corporate offence if it can show that it has in place “adequate procedures” to prevent bribery within the organisation.

Hypothetical scenarios – an analysis

Scenario 5: A “Danish Company ApS” employee, a non-UK national but ordinarily resident in the UK, pays US\$200 dollars to a local customs official to ensure that a customs stamp is obtained in a timely fashion.

UK analysis

- **Potential offence: employee**
 - ❖ The employee may be guilty of an offence of bribing a public official by virtue of his/her “close connection” with the UK.

- **Potential offence: “Danish Company ApS”**
 - ❖ Potential exposure under the corporate offence of failing to prevent bribery by a person associated with the organisation, subject to having in place adequate procedures to prevent bribery.

- **Guidance**
 - ❖ Facilitation payments are not exempt under the Act, unlike under the US Foreign Corrupt Practices Act.
 - ❖ The UK government recognises that the complete eradication of facilitation payments is a long-term objective, in respect of which the adequate procedures put in place by businesses form a key part.

Hypothetical scenarios – an analysis

Scenario 5: (cont):

UK analysis

- **Guidance**

- ❖ The Serious Fraud Office and the Director of Public Prosecution, the relevant prosecuting authorities, recognise that the prevention of the bribery of foreign public officials is a “significant policy aspect of the Act.”
- ❖ Factors in favour of prosecution for facilitation payments include:
 - The prevalence of large or repeated payment.
 - Facilitation payments that are planned for or accepted as part of a standard way of conducting business.
 - Payments that may indicate an element of active corruption of the official.
 - Clear breach of an organisation’s procedures on facilitation payments.
- ❖ Factors tending against prosecution, including:
 - Where there is a single small payment.
 - The payment(s) coming to light as a result of a genuinely proactive approach.
 - Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow.
 - The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

Hypothetical scenarios – an analysis

Scenario 5: (cont):

- **Issues for “Danish Company ApS”**
 - ❖ Establish, review and enforce **clear guidelines on “facilitation payments”**.

Application to small and medium-sized enterprises

- ❖ The Bribery Act and FCPA do not distinguish between large and small businesses. All commercial organisations, of any size, will be expected to adopt “adequate procedures” to prevent bribery.
- ❖ According to UK government guidance:
 - Businesses should adopt a “risk-based approach”, taking into account factors such as the risks relating to the jurisdictions and sectors in which a company operates.
 - The UK government Guidance acknowledges that the six principles under which businesses should form their procedures remain “flexible and outcomes-focussed”, to allow for a “huge variety” of circumstances between organisations.
 - Procedures should be “proportionate to risk” which will be linked to the size, nature and complexity of an organisation.
 - The six principles should assist all businesses of varying sizes in ensuring that organisations are able to put in place robust and effective anti-bribery procedures for their own purposes.
 - The question of whether an organisation has in place adequate procedures in the context of a particular prosecution will be a matter for the courts to resolve, taking into account the particular facts of the case.

“Red Flags”

- ❖ Companies need to be particularly vigilant in a number of areas, including purchasing and procurement, sales, business development. For example, businesses should monitor carefully:
 - Transactions with government-owned or operated **partners, contractors and customers**.
 - Dealings with **third party** agents, distributors, consultants, sponsors and representatives.
 - Payments to **freight-forwarders and customs brokers**.
 - Activities of **Joint Venture partners**.
 - **Politically active** transaction partners.
 - Close relationships with **government officials and their relatives and employees** of foreign officials.
 - **Incomplete or inaccurate information** or misrepresentations provided during pre-transaction due diligence.
 - **Requests for payments to be made to third parties** or third countries.
 - **Unwillingness** to enter into written agreements.
 - **History of corruption** in the relevant jurisdiction.
 - **Refusal to certify** that transactions will comply with applicable anti-corruption laws.
 - **Unusually high commissions**.

Compliance

- ❖ Compliance programmes limit issues, make it easier to detect issues, and ensure issues are appropriately dealt with if/when they arise. Particularly important given the “Adequate procedures” defence. Examples of best practices include:
 - Ensure **effective record keeping** and **transparency**.
 - Establish **board-level commitment** to the anti-corruption programmed.
 - ❖ *Nb*: Potential disqualification of directors for 15 years under the UK Company Directors Disqualification Act 1986.
 - Implement **effective procedures** to prevent bribery by associated persons, including employees, agents, franchisees, authorized dealers, JV partners, syndicate and consortia members.
 - Design a **code of conduct** and ethics standards which include an anti-corruption element and **enforce appropriate disciplinary measures** for breaches of the code.
 - Undertake **vetting of employees**, particularly those operating in high-risk jurisdictions, and conduct **appropriate training** and disseminate information accordingly.

Compliance

- ❖ Exercise **due diligence in assigning substantial authority** to third party agents and partners.
- ❖ Implement a **clearly defined travel, gifts and hospitality policy**.
- ❖ Carry out formal **due diligence** on potential targets, joint venture partners, franchisees, contractors, suppliers and agents.
- ❖ Establish **financial controls** to minimise risks, including a **formal authorisation procedures** for the engagement of third parties, charitable or political donations, and payment to offshore accounts.
- ❖ Develop and implement **reporting and whistle-blowing** procedures.
- ❖ Routinely **test** the effectiveness of compliance procedures.
- ❖ Ensure that **business partners and third parties meet company ethics** and legal standards.

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