



*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.
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- ❖ 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	69
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:** Civil Recovery Order of £4.829 million, plus costs. (April 2011)
 - **M.W. Kellogg Limited:** £7 million fine by the Serious Fraud Office (“SFO”). (February 2011)
 - **BAE Systems Plc:** fined £500,000, part of a £30m global agreement with the SFO and the US DoJ. (December 2010)
 - **Julian Messent:** 21 months' imprisonment, £100,000 compensation. (October 2010)
 - **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. (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. (September 2008)

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.
- ❖ 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.

The UK Bribery Act 2010: key provisions

- ❖ The UK Bribery Act 2010 was passed in April 2010.
- ❖ The Act is scheduled to come into force on 1 July 2011.
- ❖ The Act sets out 4 main offences.
 - Giving, promising or offering a bribe.
 - Requesting, agreeing to receive or accepting a bribe.
 - Offence of bribing foreign public officials.
 - ❖ If any of the above 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.
 - Corporate offence of failing to prevent bribery by “associated persons”.
 - ❖ It is a defence to the corporate offence if a commercial organisation has in place “adequate procedures” to prevent bribery and corruption by persons associated with the company.
- ❖ 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**.

The UK Bribery Act 2010: key provisions

- ❖ “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:
 - ❖ Employees.
 - ❖ Agents.
 - ❖ Subsidiaries.
 - ❖ Franchisees.
 - ❖ Joint Venture Partners.
 - ❖ Syndicates.
 - ❖ Intermediaries.
 - 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”.
 - Recent UK government guidance appears to have **restricted the scope of potential liability of commercial organisations for the activities of “associated persons”** and draws certain distinctions.

The UK Bribery Act 2010: 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”.
- ❖ 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.**
 2. **Top level commitment.**
 3. **Risk assessment.**
 4. **Due diligence.**
 5. **Communication (including training).**
 6. **Monitoring and review.**
- ❖ Procedures should be “proportionate to risk” which will be linked to the **size, nature and complexity** of an organisation.

The UK Bribery Act 2010: key provisions

- ❖ Who does the Act apply to?
- ❖ Giving or receiving a bribe or bribing a foreign public official
 - An offence is committed if a person has a “close connection” with the UK if at the time the acts or omissions were done or made. A close connection includes:
 - ❖ A British citizen.
 - ❖ An individual ordinarily resident in the UK.
 - ❖ A body incorporated under the law of any part of the United Kingdom.
- ❖ Corporate offence
 - Committed by a relevant commercial organisation **irrespective of whether acts or omissions forming part of the offence take place in the UK**. 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.

The UK Bribery Act 2010: key provisions

- ❖ Who does the Act apply to?
- ❖ The UK government 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.

The UK Bribery Act 2010: key provisions

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.

The UK Bribery Act 2010: key provisions

- ❖ 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.

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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