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Understanding the UK Bribery Act as it Relates to Organizations (Section 7)

Is There UK Jurisdiction Over the Alleged Conduct?

- Is the organization incorporated or formed in the UK?
- Does the company "carr[y] on a business, *or any part of a business*, in any part of the United Kingdom" (regardless of where in the world it is incorporated or formed)?
  - Government employs a "common sense," fact-specific test, with the UK courts being the "final arbiter."
  - Bribery Act "extends to England and Wales, Scotland and Northern Ireland."

NO → No Liability

YES ↓

Has the Company Violated the Bribery Act?

Has the company, a company employee, or a person or entity "associated with" the company offered, promised, or given a financial or other advantage to another person either directly or through a third party?

- A person or entity is "associated with" a company if he, she, or it performs services for or on behalf of the company in order to obtain or retain a business advantage for the company
- Whether a person "performs" such a "service" is an all-things-considered inquiry

[Note that requesting, agreeing to receive, or accepting a bribe ("passive bribery") is also an offense]

NO → No Liability

YES ↓

Is there evidence that the payor intended the business advantage to:

1) Induce a person to, directly or through someone else, improperly perform a "relevant function or activity"; or

2) Reward a person for the improper performance of such function or activity?

- "Relevant function" includes:
  - any function of a public nature;
  - any activity connected with business;
  - any activity performed in the course of a person's employment; or
  - any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).
- Was the person performing the function or activity "reasonably expected" to perform the function or activity in good faith and impartially, and was the person in a position to perform the function or activity because the person is in a "position of trust by virtue of performing it"?

  [To determine what is "expected" of a person, the test is what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned - local custom or practice is to be disregarded unless the conduct is permitted/required by applicable written law]

  [Note that it is irrelevant whether the function or activity has any connection with the UK or is performed outside the UK]

NO → No Liability

YES → Adequate Procedures Defense Apply?

Adequate Procedures Defense Apply?

Does the company have "adequate procedures" in place to prevent the type of bribery that occurred? This is a fact-specific inquiry covering issues such as:

- Are the company's procedures proportionate to the bribery risks it faces and the nature, scale, and complexity of the company's business?
- Are the procedures practical, clear, and accessible?
- Are the procedures effectively implemented and enforced?
- Has the company, through trainings or otherwise, promoted a meaningful, top-down culture of compliance, and is the anti-bribery policy communicated clearly to all levels of management, the employees, and transaction partners (namely, agents, intermediaries, joint venture partners, etc.)?
- Does the company engage in regular and comprehensive assessments of the bribery risks it is facing and of its anti-bribery policies and procedures?
- Does the company engage in appropriate due diligence relating to its actual and potential transaction partners?

YES → No Liability

NO ↑

Liability:

- Unlimited fines for individuals and companies
- Individuals may be imprisoned for up to 10 years

Notable Characteristics of the UK Bribery Act

- Commercial bribery *and* bribery of foreign and domestic officials is outlawed
- Bribe *recipient* can be prosecuted
- The act introduces an unmatched extraterritorial reach
- The act contains no separate "books and records" offense
- The act contains no FCPA-style "facilitation payments" exception

The information contained herein is not, and should not be relied upon as, legal advice, and is not a substitute for qualified legal counsel.