

CEP Magazine – July 2018 UK Bribery Act 2010: An analysis of Section 7

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Section 7 of the UK Bribery Act 2010 stipulates that a relevant commercial organization is guilty of an offence if it fails to prevent bribery.

How does one prevent bribery?

The Act is principle-based and puts the onus squarely on the relevant commercial organization to prove that there were indeed adequate systems, processes, and procedures in place so that any person associated with the relevant commercial organization may not commit such an act.

The guidance note issued by the Ministry of Justice on the UK Bribery Act 2010 states that, “In accordance with established case law, the standard of proof which the commercial organization would need to discharge in order to prove the defense, in the event it was prosecuted, is the balance of probabilities.”^[1]

Relevant commercial organization has been defined as:

1. A body incorporated in the United Kingdom and carrying on business there or elsewhere
2. A body wherever incorporated which carries on business in any part of the United Kingdom
3. Is similar to a partnership

Associated person is defined as a person who performs services on behalf of the relevant commercial organization. The capacity in which a person performs services does not matter (e.g., employee, agent or subsidiary are included). The fact that a person performs services will have to be determined by reference to all circumstances and not by virtue of relationship alone, and employee-employer relationship presumes the act.

Section 7 provides a comprehensive scope of all persons who are connected to the organization and are capable of an act of bribery on behalf of the organization.

Principles

The guidance on the UK Bribery Act provides for the following principles to be followed. These principles are not prescriptive but, once followed, would certainly give one a pragmatic view of the safeguards put in place by the organization to combat bribery.

1. Proportionate procedures

These are in the nature of both policies and procedures and essentially have to be implemented at the operational level for achieving the objective. It shall be directly proportional to the list of bribery risks the organization is operating with. An important point to be noted is that these procedures are either mapped separately as a stand-

alone policies and procedures document or are carefully and diligently embedded into the various company policy documents.

2. Top-level commitment

Tone at the top is an important aspect of bribery prevention. Top management has to take the lead in addressing the risk of bribery and take the necessary steps in its prevention. Communication and active top management involvement would help in fulfilling this objective.

3. Risk assessment

The risk assessment process involves carving out a separate risk assessment on bribery apart from the enterprise-wide risk assessment that an organization conducts. Bribery risk assessment would entail a detailed study of bribery risks and the steps taken to mitigate them within a stipulated time frame. The risks are prioritized and monitored for appropriate treatment and mitigation.

4. Due diligence

It involves a clear and concise assessment of bribery risks associated with the organization and ensures a deep dive on the issues based on risk priority. It entails further funneling down the risk so that the root cause of the control failure, if any, is identified and adequate and appropriate procedures are recommended as a risk-mitigation strategy.

5. Communications and training

Communication is one of the primary means of bribery prevention. It encompasses the board, top management, the vendors, customers, and the employees at large so that everyone is aware of the dos and don'ts. Training is another important aspect of bribery prevention and shall act as a deterrence for the associated persons. Specialized anti-bribery training can also be imparted to top management and persons in key functional areas like Procurement, Financial Reporting, Supply Chain, Treasury, etc.

6. Monitoring and review

Management may have adequate systems in place: implementation of an anonymous reporting call line/email to hear employee grievances, establishment of employee feedback mechanisms on training and other ethical dilemmas, appointment of a chief ethics officer and other investigation officers who are adequately trained in the latest investigation procedures. The organization may also obtain certification from anti-bribery certification authorities evidencing appropriate procedures are in place to face any eventuality with respect to bribery.

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