The United Kingdom’s improved wide-ranging anti-bribery legislation, the Bribery Act 2010[2], came into force on July 1, 2011. It is important to stress that the UK legislation is largely evolutionary rather than revolutionary. The Bribery Act 2010 was passed at a time of political change as the outgoing Labour government sought to get the legislation through Parliament before the 2010 election. As a result the then-government decided that, in addition to the legislation, the Ministry of Justice (MoJ) would produce detailed guidance to assist companies in their efforts to comply with the act. The MoJ’s guidance[3] stretches to 43 pages, with the Joint Prosecution guidance[4] a further 12 pages.

What Does the Act Cover?

The UK Bribery Act 2010 is markedly different from the US Foreign and Corrupt Practices Act (FCPA), which was formerly regarded by many as the high-water mark. The 2010 legislation replaced UK legislation stretching back to 1889. It has been called “the toughest enforcement standard in the world,” and the UK Government has said “The Bribery Act reforms the criminal law to provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad.”[5]
It has a number of stringent features, including:

- Increased penalties of up to 10 years in jail and unlimited fines for individuals, companies, and partnerships (contrasted with five years’ maximum jail term under the main provision of the FCPA);
- The banning of bribes to both public and private officials;
- An offense of failure to prevent bribery that is likely to make it easier for corporations to be prosecuted when bribery occurs;
- Reinforcement of the UK’s ban on facilitation payments;
- The criminalization of both the giving and acceptance of bribes.

The UK legislation applies to UK corporate entities—even if they are foreign-owned—individuals who ordinarily reside in the UK, and non-UK nationals and entities, if an act or omission forming part of the offense takes place within the UK.

Perhaps the most significant way in which the act alters the international anti-corruption landscape is with the offense of failure to prevent bribery. This—at least in theory—should be an easier offense for prosecutors, although corporations may be able to fall back on an “adequate procedures” defense. We have started to see some failure to prevent offenses coming through the system.

**Bribery Offenses**

The Bribery Act 2010 includes four offenses:

1. A general offense covering offering, promising, or giving a bribe (in Section 1 of the act).

2. A general offense covering requesting, agreeing to receive, or accepting a bribe (Section 2).

3. A distinct offense of bribing a foreign public official to obtain or retain business (Section 6).
4. A new strict liability offense for commercial organizations where they fail to prevent bribery by those acting on their behalf (Section 7).

The Offense of Failure to Prevent Bribery

It is the offense of failure to prevent bribery which has received by far the most attention. A company commits an offense if a person associated with it bribes another person for its benefit. Under the act a person is “associated” with the company if he performs services for or on its behalf, regardless of the capacity in which he does so. This could cover agents, employees, subsidiaries, intermediaries, joint venture partners, and suppliers. All of them could make the company guilty of the Section 7 offense.

This functions like a strict liability offense. It means that there is no need to prove negligence or the involvement and guilt of the “directing mind and will” of the company. This makes the offense easier to prove and, over time, will probably lead to more corporate prosecutions and convictions.

In one of the first cases under the failure to prevent bribery offense against Skansen Interiors Limited in 2018, the Judge, Judge Deborah Taylor, said: “…[T]here is a public utility of the public good in prosecuting cases of this kind to send a message about the necessity for companies to introduce policies and monitor policies which then lead to the prevention of bribery and corruption.”[7]

Adequate Procedures Defense

A company could have a defense to the section 7 failure to prevent bribery offense if it can prove it had “adequate procedures” in place to prevent bribery. Adequate procedures are not defined in the act, but both the MoJ guidance and the Joint Prosecution Guidance give some indications of what adequate procedures might look like.

Criminal Penalties

The potential consequences of being convicted of a bribery offense include criminal penalties for both individuals and companies. As we have already said, individuals can be jailed for up to 10 years. Fines for companies are likely to be substantial. No guidance has yet been given on the level of fines, but just prior
to the Bribery Act 2010 coming into effect, a UK Crown Court judge in a case against a company that had been found guilty of bribery said that fines for corruption should be in the tens of millions of pounds or more.

“Senior officers” (which is broadly defined and includes directors) can also be convicted of an offense where they are deemed to have given their consent or connivance to giving or receiving a bribe. Importantly, it is possible that omitting to do something might be regarded as consent or connivance and lead to prosecutions, fines and/or imprisonment. A director convicted of a bribery offense is also likely to be disqualified from being a director for up to 15 years. In fact, in one case, in a December 2014 case, as discussed below involving Sustainable AgroEnergy plc, two directors, Gary Lloyd West and James Brunel, were disqualified for 15 years with fellow director Stuart John Stone receiving a 10-year ban (case discussed later in this article).

What Does the MoJ Guidance Say?

Whilst technically the guidance speaks only to the offense of failure to prevent bribery offense, the guidance goes through most of the main provisions of the act, expanding on its principles. It also contains examples at the end of the document, which follow the same format as the draft guidance that the MoJ put out to the consultation exercise. Some of its language is legalistic, and in places, the guidance does not appear as clear as it could have been. The six principles of compliance that were in the draft guidance are retained, but have been altered slightly. Those six principles and the short explanatory notes given by the MoJ are as follows:

1. Proportionate procedures. “A commercial organization’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization’s activities. They are also clear, practical, accessible, effectively implemented and enforced.” [8]

2. Top-level commitment. “The Top-Level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by a person associated with it. They foster a culture within the organization in which bribery is never acceptable.” [9]
3. Risk assessment. “The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.” [10]

4. Due diligence. “The commercial organization applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.” [11]

5. Communication (including training). “The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces.” [12]


**Hospitality**

It is clear, in contrast to equivalent legislation in other countries, that hospitality is clearly within the scope of the Bribery Act 2010. The MoJ’s guidance had made it clear that hospitality is fully within the ambit of the law, saying “Hospitality and promotional or other similar business expenditure can be employed as bribes.” [14] It seems to be the view of the UK government and the prosecutors that hospitality is often just the first act in a bribery play. For example, one of the prosecutors said during the act’s implementation that hospitality is “used . . . to groom employees . . . into a position of obligation and thereby prepare the way for major bribery.” Against this background, it was natural that hospitality was one of the main areas of concern in submissions to the MoJ consultation.

Earlier guidance from the MoJ did not shed sufficient light on the level of hospitality that would be permitted and how that value would be determined. The then Lord Chancellor and Secretary of State for Justice Kenneth Clarke commented on this specifically in his March 30, 2011, announcement, stating:
The guidance makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business.[15]

The MoJ’s guidance also states that the sector of business could be taken into account. What is viewed as normal entertaining in some industries would likely appear lavish in others. The MoJ’s guidance says:

The standards or norms applying in a particular sector may also be relevant .... However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.[16]

The guidance also explains that travel and hospitality connected with the service offered is unlikely to be prosecuted—for example, a trip to see a hospital to show the efficiency of its management and standards of care is likely to be acceptable to a potential buyer of those services. It also confirms what might otherwise be obvious—problems are more likely: “the more lavish the hospitality or the higher the expenditure.”

**Facilitation Payments**

Facilitation (or facilitating) payments—small payments to government officials to expedite an official act—are in some circumstances permitted under the FCPA but are not allowed under the UK Bribery Act 2010. The MoJ guidance has a slightly changed tone on facilitation payments from the earlier draft. Whilst emphasizing that they are not permitted, in contrast to the FCPA, the guidance states that the eradication of facilitation payments is a long-term objective. The MoJ’s guidance also states that duress would be a factor taken into account when considering prosecutions for making facilitation payments. The MoJ guidance says:

It is recognized that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defense of duress is very likely to be available in such circumstances.[17]
Associated Persons

Another area of special difficulty for multinational corporations has been the fact that a corporation can be liable under Section 7 of the act if a person associated with it bribes another person intending to obtain or retain business or a business advantage for the organization. The investigatory firm Control Risks has called associated persons “the single most important risk companies need to manage” and has said that all of the major corruption cases in recent years have involved bribes paid by third parties such as commercial agents.

The MoJ guidance makes it clear that an associated person can be an individual, or an incorporated or unincorporated body. The capacity in which a person performs services for and on behalf of the organization does not matter, so employees, agents, and subsidiaries will be included. At least one former prosecutor has also said that the definition was wide enough to include an obligation on franchisors to ensure that their franchisees comply. The MoJ guidance would seem to confirm that:

This broad scope means that contractors could be ‘associated’ persons to the extent that they are performing services for or on behalf of a commercial organization. Also, where a supplier can properly be said to be performing services for a commercial organization, rather than simply acting as the seller of goods, it may also be an “associated” person.[18]

The MoJ guidance does, however, seem to give more comfort than was previously thought, saying that, where a supply chain involves several entities or a project that is to be performed by a prime contractor with a series of subcontractors, an organization is unlikely to be prosecuted for failure to exercise control over those further down the chain than its own contractual reach. This means that a prime contractor will be liable for the acts of his subcontractors, but not his subcontractors’ subcontractors. The contractor would still need to explain its anti-bribery policy to those it contracts with and also ask them to pass compliance obligations down the chain.