



MILLENNIUM

HOTELS AND RESORTS

More than Meets the Eye

BRIBERY ACT FREQUENTLY ASKED QUESTIONS (FAQs)

Last updated on 19 April 2016

1. BACKGROUND

1.1. What is the Bribery Act?

The Bribery Act 2010 is UK legislation that reforms the criminal law of bribery, making it easier to tackle this offence proactively in the public and private sectors.

It introduces a corporate offence which means that commercial organisations will be exposed to criminal liability, punishable by a fine, for failing to prevent bribery.

It repeals the UK's existing anti-corruption legislation – the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts of 1906 and 1916 and the common law offence of bribery – and provides an updated and extended framework of offences to cover bribery both in the UK and abroad.

1.2. When did it come into force?

The Bribery Act received Royal Assent in April 2010 and came into force on 1st July 2011.

1.3. What is bribery?

Bribery is generally defined as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so.

1.4. Why is there so much focus on the Bribery Act compared to other laws?

The Bribery Act generally is considered to be the strictest anti-bribery and corruption legislation in the world—at least in terms of scope and application—and so it is important to use the Bribery Act requirements as the basis for compliance globally.

2. KEY PROVISIONS OF THE BRIBERY ACT

The Bribery Act sets out the following offences:

2.1. Section 1 – Offering, promising or giving a bribe to another person to perform a relevant 'function or activity' improperly, or to reward a person for the improper performance of such a function or activity. (**'Active' bribery**)

Under the Bribery Act, a 'relevant function or activity' is any function of a public nature or any activity connected with a business, performed in the course of a person's employment or

performed by or on behalf of a body of persons, whether corporate or unincorporated, which meets one or more of the following conditions:

- a person performing the function or activity is expected to perform it in good faith
- they are expected to perform it impartially
- they are in a position of trust by virtue of performing it.

2.2. **Section 2** – Requesting, agreeing to receive or accepting a bribe to perform a function or activity improperly, irrespective of whether the recipient of the bribe requests or receives it directly or through a third party, and irrespective of whether it is for the recipient's benefit. (**'Passive' bribery**)

2.3. **Section 6** – Bribing a foreign public official.

2.4. **Section 7** – Failure of a commercial organisation to prevent bribery (the corporate offence). This is a 'strict liability' offence and an organisation can be found guilty of 'attempted' or 'actual' bribery on the organisation's behalf. (Strict liability offences do not require proof of intention or recklessness – in other words, it is not necessary for the prosecution to show that the company intended to make the bribe in bad faith, or that it was negligent as to whether any bribery activity took place). It should be noted that section 1 or section 6 needs to be proven for a section 7 offence to apply.

2.5. **Section 14** – Offering or receiving a bribe or bribing foreign official. This section applies if an offence under sections 1, 2 or 6 is committed by a body corporate.

3. **BREACHES AND PENALTIES FOR BREACH**

3.1. **An offence under section 1 (bribing another person) or section 2 (being bribed):**

A person guilty of an offence under these sections is liable, on summary conviction (i.e. if tried in a magistrates' court) to imprisonment for a term not exceeding 12 months (subject to section 11(4)(a)), a fine not exceeding the statutory maximum, or both. On conviction on indictment (i.e. in the criminal court), they are liable to imprisonment for a term not exceeding 10 years, a fine, or both.

Any person associated with the organisation in question (this could be an agent, contractor, service provider or subsidiary of the organisation as well as an employee) who is guilty of an offence under these sections is liable, on summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment to a fine.

3.2. **An offence under section 7 (failure of commercial organisations to prevent bribery):**

An organisation guilty of an offence under this section is liable, on conviction on indictment, to a fine. (**Note:** Even if an organisation has delegated the relevant activities a named individual, it remains responsible for them.)

A 'twin-track' approach can be used to take action against an individual under section 1 and an organisation under section 7 simultaneously.

4. **WHY/HOW IS THE BRIBERY ACT RELEVANT TO MHR (INCLUDING MHR AFFILIATES NOT REGISTERED IN THE UK)?**

4.1. **Millennium Hotels & Resorts (MHR) companies:**

Any company incorporated under the law in the United Kingdom falls under section 7 of the Bribery Act. Consequently Millennium & Copthorne Hotels plc (**M&C**) and each of its subsidiaries and affiliates are responsible for compliance with the Bribery Act and must put in place adequate preventative procedures for acts of bribery and corruption committed by persons associated with them in the course of their work. The Bribery Act has extra-territorial application and will apply to M&C subsidiaries registered outside of the UK as those are likely considered to be associates of M&C.

4.2. **MHR directors and employees:**

Any individual associated with an organisation who commits acts or omissions forming part of a bribery offence may be liable for a primary bribery offence under the Bribery Act or for conspiracy to commit the offence with others – including, for example, their employer.

Likewise, a senior manager, employee or board member who consented to or connived in a section 1 or section 6 bribery offence will, together with the organisation, be liable for the section 7 ‘corporate offence’ under the Bribery Act.

5. **AVOIDING LIABILITY UNDER THE BRIBERY ACT**

5.1. **How can MHR avoid liability under the Bribery Act?**

MHR will have to show that it has implemented ‘adequate procedures’ designed to prevent individuals associated with that organisation from engaging in bribery in order to avoid liability.

5.2. **What is meant by ‘adequate procedures’?**

‘Adequate procedures’ relates to relevant compliance protocols and procedures that a commercial organisation should put in place to prevent bribery by individuals associated with it. This might include training, briefing or new internal procedures. The existence of adequate procedures will constitute a complete defence for an organisation. ***Accordingly, it is critical that the Bribery Act pack recently sent to you is understood and implemented.***

5.3. **Liability for employees as well as “associated (third) parties”**

Under the Bribery Act, a person is considered to be associated with a commercial organisation if they perform services for it or on its behalf. This person can be an individual or an incorporated or unincorporated body, and may be, for example, a supplier or an agent appointed by MHR to perform a service on its behalf.

5.4. **For MHR’s US companies, does compliance with the US’s Foreign Corrupt Practices Act (“FCPA”) constitute “adequate procedures”?**

For MHR’s US companies or other countries where there are robust anti-corruption laws, it depends on how you comply with the requirements of FCPA (or other national laws) and whether your current compliance programme covers the key elements of the Bribery Act. It is important to note that the Bribery Act is significantly broader than the FCPA, and features stricter scrutiny and enhanced criminal penalties.

The following are the key differences between the Bribery Act and the FCPA:

- The FCPA focuses on anti-corruption of foreign governmental officials whereas the Bribery Act also covers non-governmental officials (i.e., private citizens). The Bribery Act makes any bribery illegal – not just the bribing of a foreign government official (or the attempt thereof).
- In addition to banning the actual or attempted bribery of private individuals and public officials, the Bribery Act also prohibits the receipt of bribes. The FCPA contains no such provision.
- Unlike the FCPA, the Bribery Act does not have a facilitation payments defence. Under the Bribery Act, certain types of corporate hospitality are prohibited if they are “intended to subvert the duties of good faith or impartiality that the recipient owes his or her employer.”
- The FCPA has no strict liability offence either written directly into the statute or interpreted by judicial review. The Bribery Act creates a new strict liability offence for the failure of a company to prevent bribery. Under the Bribery Act, companies will be liable if anyone acting on its behalf commits bribery which includes its employees, agents, subsidiaries, joint venture partners, and consultants. The only defence is where a company has adequate procedures in place to prevent bribery from occurring.
- The FCPA has criminal penalties of five years per offence. The Bribery Act has penalties of up to 10 years per offence and unlimited fines for companies that have failed to implement “adequate procedures.”
- The FCPA “books and records” provisions could be used to prosecute the bribery of private individuals as well as public officials. The Bribery Act has no equivalent provision (except insofar as companies are required to maintain accounts in accordance with the UK’s Companies Act 2006).
- Companies subject to FCPA will need to revise their FCPA compliance programs to take into account the Bribery Act provisions.

5.5. Where are MHR companies most vulnerable under the Bribery Act?

Third parties acting for businesses as part of the supply chain and improper use of gifts and corporate hospitality are the areas where businesses need to be careful.

Corporate gifts and hospitality are permitted and MHR’s policy on hospitality and gifts must be followed. Reasonable and proportionate corporate hospitality that has a clear business purpose is acceptable, provided it is transparent, properly documented, and not intended to induce someone to act improperly.

5.6. What advice or guidance will be issued to directors or employees on what they should be doing and what their responsibilities are under the Bribery Act?

Regional legal departments acting under instructions of the Company Secretariat and regional HR departments are responsible for providing guidance and support to MHR business teams. However, it is every employee’s responsibility to ensure that anti-bribery and anti-corruption policies and procedures are followed.

6. MUST ALL MHR “OWNED” OR “BRANDED” HOTELS COMPLY WITH MHR ANTI-BRIBERY POLICIES?

- 6.1. **MHR owned/managed hotels:** All MHR owned and operated hotels must comply with MHR anti-bribery and anti-corruption policies.
- 6.2. **MHR branded hotels operating under a franchise agreement:** Any breach of the Bribery Act by a hotel operating under a MHR brand (including any Millennium, Copthorne or a Leng's Collection brand) will have severe repercussions on MHR's reputation and goodwill. Accordingly, hotels operated under any MHR brand should comply with MHR's anti-corruption policies or have in place (and enforce) their own equivalent anti-bribery policies.
- 6.3. **Property owned by MHR but operated under a non-MHR hotel brand or by third parties:** It is a matter for each company to manage its own business/brands in compliance with the law in the region it operates. Prudent management of a business will include ensuring compliance with all applicable anti-corruption laws. We expect that large hotel groups or brands such as Hilton and AccorHotels will have their own effective anti-corruption policies, but it is recommended that MHR's policies be shared with the third-party operators.
- 6.4. **Joint ventures:** MHR anti-corruption policies should apply where MHR is the controlling partner in any joint venture enterprise. Where MHR policies are not enforced, it is expected that the enterprise will have in place its own effective anti-corruption policies. If not, MHR should share its own best practices in order to encourage its commercial partners to adopt MHR's policies or develop its own anti-bribery policies.

7. DUE DILIGENCE CHECKS

- 7.1. **Legal and HR departments of MHR owned or branded companies should take the following action:**
- review and understand the Anti-Bribery and Anti-Corruption Compliance Guide (the Compliance Guide) recently sent to them;
 - implement the procedures to prevent bribery from occurring as set out in that Guide;
 - be clear that, as part of the MHR group of companies, acts of bribery by any employees, contractors and agents will impact on the company as a whole;
 - take steps to ensure a MHR company's employees, contractors and agents are aware of the standards of behaviour that are expected of them. This will include online training for groups of employees who are impacted by the Bribery Act – for example, employees with responsibility for procurement. (Note: It is intended that annual online training will be introduced in 2016);
 - monitor and review on an ongoing basis, any governance procedures, decision-making processes and financial controls, and recommend that such controls be introduced if not already in place and, where necessary, provide appropriate anti-bribery training in relation to areas where MHR is exposed to risks;
 - record any anti-corruption steps taken, as it provides a defence against corporate liability under the Bribery Act; and
 - as the monitoring and review process is iterative, the process must be repeated on a periodic basis.

It is important to note that the Bribery Act will not change the internal disciplinary processes that should be followed to investigate any alleged acts of bribery or corruption before a disciplinary sanction is imposed.

7.2. What if a service provider refuses to complete the questionnaire for “associated persons” deemed as “high risk” (see Appendix 1, Section B(3)(b) of the Compliance Guide)?:

Any supplier or other “associated person” deemed as “*high risk*” must complete and return the “Associated Persons Questionnaire” to assist MHR with its due diligence checks on that entity. If that entity refuses to comply, it is up to the applicable commercial team, supported by the regional legal team, to consider whether to proceed, although the motives for refusing to complete the questionnaire should be queried as part of the due diligence process.

It is possible that a refusal to complete the questionnaire may be itself considered a “red flag” suggesting that further due diligence/background checks should be conducted. If the applicable commercial or legal team is unable to get comfortable with any arrangement or transaction or with the counterparty itself, then any agreement with that counterparty should be reviewed on the basis that it could put MHR directors and employees at risk as well as damage MHR’s reputation and goodwill.

All contracts with “associated persons”, and generally all contracts signed by MHR should include appropriate anti-bribery and anti-corruption language. Examples of such clauses are provided at Appendix 4 of the Compliance Guide.

7.3. What does regional legal department review of “high risk” due diligence checks mean?

Regional legal teams must ensure that the applicable commercial teams have conducted sufficient due diligence checks on counterparties they intend to contract with. While we cannot be prescriptive as to what would consist of a sufficient due diligence review, it would likely include a consideration of one or more of the following:

- review of facts of each case,
- Review of what due diligence checks have been conducted by the applicable commercial team, and if these are considered sufficient given the perceived risks associated with any contract,
- whether the counterparty’s directors are known and whether checks against these directors have been conducted,
- does the counterparty exist on a recognised company registry,
- have any “red flags” been identified following a general internet/Google search, etc.

If a second opinion is required in relation to *high risk* contracts or counterparties, you may email members of the Europe legal or Company Secretariat teams in London, who can review the matter and perform a sense check to identify whether any red flags are identified. In addition, the Company Secretariat has access to the Dow Jones risk database that may assist in identifying any additional risks associated with a contract or counterparty.

Note that the Central Procurement Office (**CPO**) based in London requires each new supplier to complete a questionnaire pertaining to its business so that the supplier may be added to MHR’s procurement system. A similar process should be used by procurement teams in other regions. While the regional legal team is not generally involved in this process, the information obtained by CPO may assist the regional legal team in conducting a review of due diligence checks.

7.4. Must you use the anti-bribery language provided in Appendix 4? And if so, when should you use the long-form or short-form version?

All MHR agreements should generally contain appropriate anti-bribery and anti-corruption language especially where “associated persons” are being contracted or in relation to supply contracts. In the event of prosecution by criminal authorities, the existence of anti-bribery language in an agreement is evidence of MHR’s desire to comply with applicable anti-bribery laws and will assist in any defence. The anti-bribery language provided in Appendix 4 is to assist the regional legal team and is not prescriptive. Each regional legal team is expected to assist in the implementation of anti-bribery clauses in contracts specific to their region.

The short form clauses are provided as general guidance and may be used in most contracts except in very significant/larger value contracts (such as broker agreements, significant development project agreements, large consultancy arrangements, etc.) in which case, a more comprehensive anti-bribery clause would be appropriate. While regional legal teams have limited oversight over the numerous hotel level agreements entered into, regional Legal teams should take a risk-based approach in considering the best way to implement the anti-bribery provisions.

8. DEALING WITH QUERIES & REPORTING SUSPICIOUS ACTIVITY

8.1. Who should commercial teams refer any anti-bribery queries to in the first instance?

The regional legal team should be the first point of contact if any employee in their region has any questions relating to anti-bribery and anti-corruption.

8.2. What should I do if I suspect bribery is occurring?

You should report any suspicions or allegations of bribery immediately to one of the following:

- your departmental manager; the regional Legal department or the Company Secretary; or
- via MHR’s whistleblowing function (please refer to MHR’s “*Whistleblowing Policy*” for further guidance).