



UK Ghana Chamber of Commerce and American Chamber of Commerce Ghana:



Perspectives on the UK Bribery Act and the FCPA

Korieh Duodu

Egality Law

27 October 2020



What we will cover

- The basics: bribery and corruption definitions
- Relevant legislation -FCPA (USA), Bribery Act (UK), Ghanaian legislation
- What is an adequate anti-bribery and corruption programme?
- Policy
- Senior Management's role - “tone from the top”

About the Speaker

- Korieh Duodu - Principal, Equality Law
- Equality Law is an international law firm with offices in London and Accra, with a keen focus on high quality service delivery
- We assist a range of clients - from multinationals to non-profits - to identify and mitigate compliance risks in domestic and international operations.
- For more information, please visit - www.egality-law.com

The basics: What is bribery?



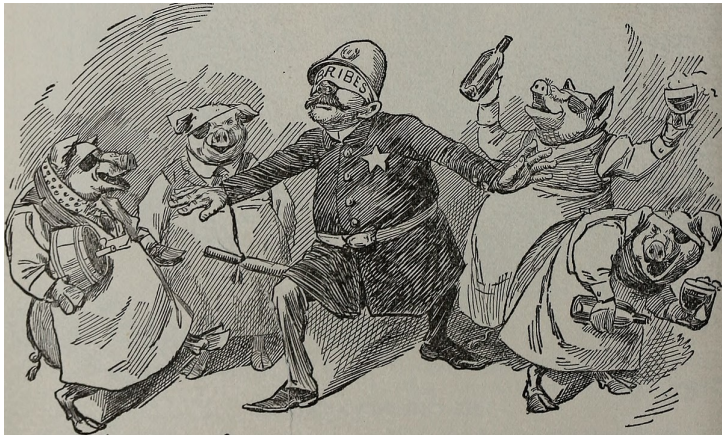
- Bribery takes place when people give or offer a financial (or other) advantage to induce someone to behave improperly.

The basics: What is corruption?



- Corruption is the abuse of entrusted power for private gain. (Working definition used by Transparency International (TI), applying to both the public and private sectors.)
- It often depends on the circumstances and the intention of the party offering or receiving, but intention to corrupt is not always required

Examples of bribery and corruption



- Accept a payment, gift or hospitality from a third party that you know, or suspect is offered with the expectation that you will provide a business advantage for them or anyone else in return
- Accept hospitality from a third party that is unduly lavish or extravagant under the circumstances.
- Offer or accept a gift to or from government officials or representatives, or politicians or political parties, without prior approval
- Do any of the above through a third party
- Anywhere in the world

Airbus £3 Billion Fine for Bribery



- The world's largest airplane manufacturer, Airbus was fined by UK, US and French prosecutors, a record-setting £3billion.



US Foreign Corrupt Practices Act

- Came into force 1977
- Criminalizes:
 - payments from entities to foreign government officials
 - to assist in obtaining or retaining business
- Companies are vicariously liable for the acts of others including JV partners, agents, third-party intermediaries etc.
- Entity or individual must be "aware of a high probability" that the third party will commit a potential FCPA violation
- International reach: applies to U.S. Citizens. Also applies to foreign entities that make a corrupt payment within USA territory

US Foreign Corrupt Practices Act- Key Elements

- Five elements :
 - a payment, offer, authorization, or promise to pay money or anything of value
 - to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official
 - with a corrupt motive
 - for the purpose of:
 - (a) influencing any act or decision of that person,
 - (b) inducing such person to do or omit any action in violation of his lawful duty,
 - (c) securing an improper advantage, or (d) inducing such person to use his influence to affect an official act or decision
 - in order to assist in obtaining or retaining business for or with, or directing any business to, any person.

How the US Foreign Corrupt Practices Act (FCPA) affects you

- Application to extraterritorial acts of:
 - US corporates, their agents and employees
 - US citizens and residents
 - Including any act within US e.g. a phone call or bank payment
 - **NOTE: Also applies to foreign nationals employed by US entities...**
- Bribery of foreign public officials and bribe payments made through intermediaries criminalised
- Levels of FCPA enforcement remain high - check US Dept of Justice website and press releases...

UK Bribery Act



- Bribery Act 2010
- Came into force 2011
- **Sea change** - made it easier to prosecute UK companies for bribery
- Make companies strictly liable for the acts of others including JV partners, JV entities, representatives etc.
- International reach: any UK citizen, resident or corporate entity with “a connection with” the UK is potentially liable under the act

UK Bribery Act - Key Offences

- Four offences:
 - active bribery (i.e. giving, promising or offering a bribe), which applies in the public or private sector
 - passive bribery (i.e. requesting, agreeing to receive or accepting a bribe), which applies in the public or private sector
 - bribing a foreign public official
 - ‘corporate’ offence which applies where a company fails to prevent those performing services on their behalf from paying bribes

UK Bribery Act - Paying and Receiving a bribe



- Offer
 - Briber offers, promises or gives a financial or other advantage to another person
 - Requires intention
 - Such schemes will often be hidden
 - Assessment of "improper performance"
- Acceptance
 - Receiver requests, agrees to receive or accepts a financial or other advantage intending that a relevant function or activity should be improperly performed by recipient or another
 - All require improper performance

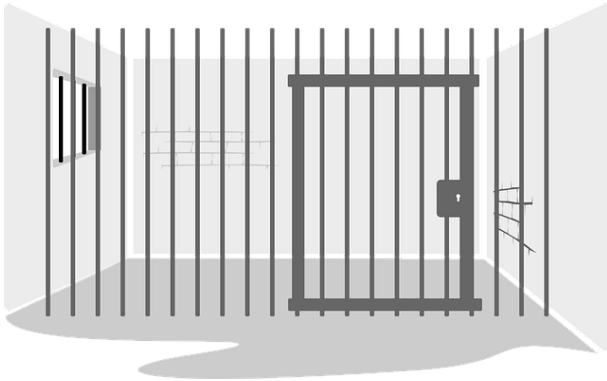
UK Bribery Act: Bribing a foreign public official

- Briber must intend to influence the foreign public official in his capacity as a foreign public official; and
- Briber must intend to obtain or retain business or an advantage in the conduct of business; and
- Briber must directly or through a third party, offer, promise or give an advantage to Foreign public official or to another person at Foreign Public Official's request or with foreign public Official's assent or acquiescence; and
- An offence is not committed if foreign public official is permitted or required **under applicable written local law to be influenced in his capacity as a foreign public official by the offer, promise or gift.**

Section 7, UK Bribery Act: The failure by a commercial organisation to prevent bribery

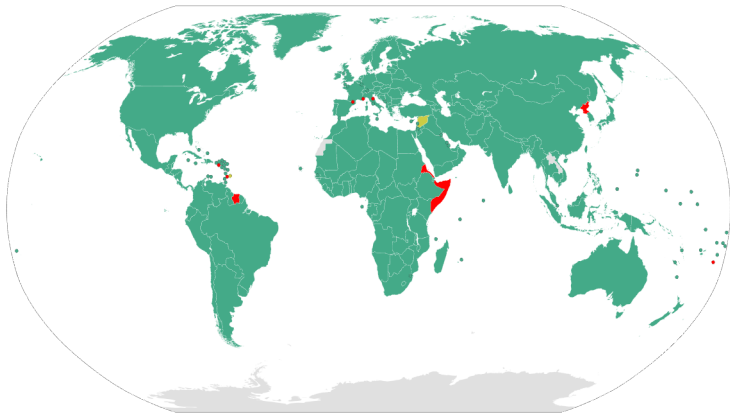
- The Corporate Offence
 - A company or partnership is guilty of an offence if:
 - Someone associated with the company bribes another person
 - Intending to obtain or retain business or a business advantage for the company
- The Corporate Defence
 - It is a defence for the Company to show that there were adequate procedures in place designed to prevent persons associated with it from undertaking such conduct
 - statutory guidance - section 9, UK Bribery Act

Penalties under the FCPA and the UK Bribery Act



- FCPA
 - Criminal fines and civil penalties for companies
 - Criminal fines and imprisonment for individuals
- UK Bribery Act
 - For companies a (theoretically) unlimited fine and confiscation of the gross revenue of any contracts/benefits obtained from bribery
 - Criminal fines and imprisonment for individuals

International reach



- International focus on combating corruption
- UN Convention Against Corruption (December 14, 2005)
- Focus is on prevention rather than prosecution
- OECD Convention 1997
- Business partners need to consider the risks of those they do business with - extra-territorial application of legislation

What is an adequate Anti-Bribery and Corruption Programme?

Putting in place adequate procedures

- Organisations must develop and implement “adequate procedures” to prevent corruption by those providing services on their behalf
- If there are adequate procedures but a bribe is nevertheless paid, the organisation would have a **defence** to any prosecution for the corporate offence under UK Bribery Act
- Note: ‘adequate procedures’ are not a defence as such under other laws (although could provide basis for MITIGATION in other jurisdictions)

Key themes of adequate procedures:



Proportionate procedures (corporate hospitality, gifts)



Top-level commitment



Risk assessment



Due diligence



Communication (including training)



Monitoring and review

Examples of key failings



- Inadequate due diligence of third-party relationships at outset of relationship
- Inadequate due diligence before payments made
- Failure to take risk-based approach to due diligence
- Failure to routinely review and monitor third party relationships
- Inadequate guidance and training to staff
- Failure to establish and record the commercial rationale for payments to overseas partners/entities

Best Practices in Anti-Bribery and Corruption

Ethics and Business Conduct Policy



- Review the published policies of successful multinational corporations
- Adapt such policies and apply them **proportionally**
- **Take advice** on what may be proportionate and effective risk-based approach for your specific business

Anti-Bribery and Disciplinary Policies

- Consider the following policies:
 - Anti-bribery and corruption policy
 - Business Ethics Policy
 - Gift policy
 - Procurement Policy
 - Whistleblower Policy
- **Back these policies with disciplinary sanctions in employment contracts**
 - gross misconduct?
 - Summary dismissal?

Dealing with third parties... ask yourself:



- Is the arrangement on commercial terms?
- Are the terms of the proposed deal transparent?
- Is there a link between the services being offered and any separate business advantage you wish to secure?
- Have you considered how the proposed transaction might be viewed under your anti-bribery and corruption policy?
- Are there any potential conflicts of interest?
- Have you identified any red flags and mitigated any risks associated with this proposition?
- Have you taken advice on this matter?
- Have you documented your decision and cleared it with all appropriate personnel?

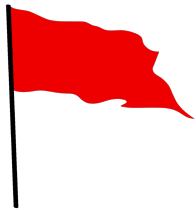
What will compliant business partners be looking for?

- Anti-bribery and corruption policies in place
- Adequate due diligence of third-party business relationships
- Connections you may have with those you do business with, possible conflicts of interest, history, financial records
- Commitment of business partners to such policies and evidence of training for staff
- Evidence of good record keeping
- Scrutiny of intermediaries and agents

Increased ABC risks associated with third party transactions

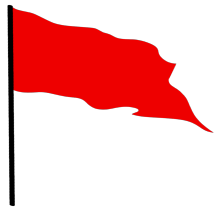
- Increasing liability on companies (particularly in the UK, EU, Australia and the US) to ensure that the third parties they deal with will not engage in corrupt activities
- Note that many jurisdictions have a concept of corporate criminal liability
- Vicarious or strict criminal liability for the acts of those third parties
- Civil liability

Third party red flags



- The following is a list of red flags when dealing with third parties. Some may mean you should discontinue the due diligence / relationship; others may require mitigation:-
 - you learn that a third party has a reputation for paying bribes, or requiring that bribes are paid to them, or has a reputation for having a "special relationship" with foreign government officials;
 - a third party insists on receiving a commission or fee payment before committing to sign up to a contract with X, or carrying out a government function or process for X;
 - a third-party requests payment in cash and/or refuses to sign a formal commission or fee agreement, or to provide an invoice or receipt for a payment made;
 - a third-party requests that payment is made to a country or geographic location different from where the third party resides or conducts business;
 - Contract price seems unusually high or does not represent value for money

Corporate Social Responsibility red flags



- Look out for disguised Corporate Social Responsibility programmes
- Consider whether the proposed project presents value for money - conduct due diligence
- Is there an improper advantage being gained?
- Is there a connection to a public official or PEP?
- Any other conflicts of interest?

Charitable donations :



- Due diligence on charitable donations (particularly where charity is affiliated to a public official or has been ‘instructed’ to receive a donation...
- Example - SEC charged Schering-Plough under FCPA

“Tone from the
top”

“Tone from the top”



- Internal communications must display a 'Tone from the Top' approach.
- The approach must be succinct and coherent at all levels of business.
- Company managers who personally consent or connive in bribery commit a criminal offence under the UK Bribery Act.
- Senior Management exhibiting “wilful blindness” can be guilty under the FCPA (US v Frederic Bourke).

Conclusion



- UK and international authorities are increasingly looking to clamp down on bribery and corruption.
- All employees in the business should be aware of your Ethics & Business Conduct Policy.
- Training and compliance should be regularly monitored at all levels of the business.
- Remember that catching bribers is big business - massive fines and repatriation orders can line the state's coffers
- Whistle-blower incentives are leading to an increase in reporting of bribery and corruption

Thank you

Korieh Duodu

Principal, Equality Law

kduodu@equality-law.com