



Conducting Honest Business Abroad: Liability, Risk and Good Practice

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*The views expressed are personal and do not necessarily
represent those of the Parties to the Convention*



Overview

1. The foreign bribery offence and the liability of individuals and companies
2. The consequences of bribing
3. Good practice guidance

(1) The foreign bribery offence:

Article 1: Foreign Bribery Offence

- Focus on active bribery – “the supply side”

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other advantage in the conduct of international business.

- Reflected in the Criminal Code of Estonia, sections 297 and 298

(1) The foreign bribery offence:

Elements of the Offence

- *...any person...*
 - Natural and legal persons (when combined with Article 2)
- *...to offer, promise or give...*
 - If a bribe is offered or promised, it does not need to be “paid” for an offence to have been committed
- *...any undue pecuniary or other advantage...*
 - The bribe must include any form of advantage given to the foreign public official or a third party, not only money
 - The value of the advantage is irrelevant, as are perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment



(1) The foreign bribery offence:
Elements of the Offence

- *...whether directly or through intermediaries...*
 - Article 1 includes bribery committed through an intermediary, subsidiary or other agent (i.e., bribery through a person acting as a go-between)
- *...to a foreign public official...*
- *...for that official or for a third party...*
 - The offence covers bribes that benefit a foreign public official's family, political party, or another third party

(1) The foreign bribery offence: Elements of the Offence

- *...in order that the official act or refrain from acting in relation to the performance of official duties...*
 - Article 1(4)(c) clarifies that this includes any use of the public official's position, whether or not within the official's authorised competence
- *...in order to obtain or retain business or other advantage...*
 - Foreign bribery is a crime even if the desired results are not achieved, and even if the company would have achieved the desired results without giving the bribe (e.g., even if the company was the best qualified for a tender)



(1) The foreign bribery offence:

How far does it go?

- It applies to individuals and companies
 - Convention, Article 2; Criminal Code, section 14
- Whether done (in full or in part) in Estonia or abroad
 - Convention, Article 4; Criminal Code, sections 6 and 7
- Bribe payments are not tax deductible
 - 2009 Recommendation on Tax Measures to Further Combat Bribery; Income Tax Act, sections 12, 14, 29, 34, and 51
- Laundering of the bribe or its proceeds is illegal
 - Convention, Article 7; Money Laundering and Terrorist Financing Prevention Act 2007, section 4

(2) The consequences of foreign bribery: Why fight foreign bribery?

Convention preamble:

“...bribery...raises serious moral and political concerns, and distorts international competitive conditions”

1. Moral concerns

- Corporate ethics
- Diversion of public funds from their proper purpose (e.g. paying more for arms than necessary) or of resources from national programmes (e.g. mining)

2. Political concerns

- Undermines the effective operation of public institutions and contributes to an overall environment of corruption;

(2) The consequences of foreign bribery:

Why fight foreign bribery?

3. Distorting international competitive conditions

- Corruption long recognised (by the G-20 and others) as vital to sustained economic growth and strong investment activities
- Negatively affects fair competition by putting companies that do not bribe at a competitive disadvantage, and adding to costs for companies that do bribe
- Reduces the stability and security of foreign markets, and presents an inhospitable environment for foreign investment
- Discourages foreign investment, and trade and commercial dealings

(2) The consequences of foreign bribery:

Why not bribe?

- Corporate ethics
 - Linked to good governance and the maintenance of an honest workplace
 - Linked to reputation
- Owner / shareholder accountability
- Criminal liability
- Heavy sanctions applicable

(2) The consequences of foreign bribery:

Sanctions

- Individuals

- Giving a gratuity (Criminal Code, section 297):
max. 3 years imprisonment (5 years for repeat offenders)
and/or fine 500 x daily taxable income
- Giving a bribe (Criminal Code, section 298):
max. 5 years imprisonment (2-10 years for repeat offenders)

- Companies

- Fine up to Estonian Kroon 250 million (€16 million)

- Other sanctions

- Confiscation of bribe and its proceeds
- Debarment from public procurement, ODA projects and officially supported export credits

(3) Good Practice: 2009 Recommendation, Annex II

- Good Practice Guidance on Internal Controls, Ethics and Compliance
 - Non-legally binding guidance
 - To help companies prevent and detect foreign bribery by their employees and/or management
 - Flexible - intended to be adapted to business operations
- Guidance
 - Development of effective internal controls, ethics and compliance programmes based on risk assessments
 - Assistance from/by business associations and professional organisations



(3) Good Practice:
Annex II Good Practices

1. Strong explicit support from senior management
2. Clear policy prohibiting foreign bribery
3. Compliance is the duty of all individuals at all levels
4. Oversight of ethics and compliance by senior officer with adequate autonomy from management
5. Covers relevant areas (gifts, travel, etc)
6. Ethics and compliance of business partners
7. Financial/accounting procedures
8. Reporting on ethics and compliance measures



(3) Good Practice:
Annex II Good Practices

9. Positive support for observance of ethics and compliance programmes
10. Appropriate disciplinary procedures
11. Effective measures for providing guidance to employees and management, especially those operating abroad
12. Periodic reviews of ethics and compliance programmes



For More Information

www.oecd.org/corruption