

UK Bribery Act 2010: Facts and Implications for Businesses

The UK Bribery Act 2010 ('Bribery Act' or 'Act'), which came into force on 1 July 2011, has brought in significant changes to the UK anti-corruption law, replacing the UK's previous bribery laws, and will need to be taken into account by, inter alia, individuals, businesses and prospective buyers in the context of acquisitions as well as joint venture partners when establishing a joint venture, and not just within the UK itself.

Offences under the Bribery Act

The Act extends the crime of bribery to cover all private sector transactions. Previously, bribery offences were confined to transactions involving public officials and their agents. The Act does not apply retrospectively; therefore, only corrupt conduct that takes place after it has come into force constitutes an offence under the Act.

The Bribery Act has created four separate offences:

- (i) A general offence of offering, promising or giving a bribe (section 1, Bribery Act).
- (ii) A general offence of requesting, agreeing to receive or accepting a bribe (section 2, Bribery Act).
- (iii) A distinct offence of bribing a foreign public official to obtain or retain business (section 6, Bribery Act).
- (iv) A new strict liability offence for commercial organisations that fail to prevent bribery by those acting on their behalf (their associated persons), where the bribery was intended to obtain or retain a business advantage for the commercial organisation (section 7, Bribery Act).

For the purposes of the section 7 offence, the term "associated person" is widely defined, and will apply to people over whom an organisation has little control, such as intermediaries, agents, sub-contractors and other persons acting on its behalf. It will also cover employees, subsidiaries, contractors and suppliers that perform services for or on behalf of the organisation, and may include joint venture partners and joint venture companies where these organisations perform services for or on behalf of each other. The

guidance published under section 9 of the Act (the "Guidance"), clarifies that even where an agent or subsidiary was performing services for the organisation, an offence will only be committed if that agent or subsidiary intended to obtain or retain business or an advantage in the carrying out of business for the organisation. The Guidance gives an example of where a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is the case, even if the parent company or subsidiaries benefit indirectly from the bribe.

To be guilty of a strict liability offence under section 7, an organisation does not need to be aware of the bribe, and will only have a defence if it can demonstrate that it had in place "adequate procedures" to prevent bribery. The Guidance recognises that an organisation will only have control over relationships with its contractual counterparty and not sub-contractors. The Guidance, therefore, suggests that companies adopt anti-bribery procedures with their contractual counterparty and ask that counterparty to adopt a similar approach with the next party in the chain.

Senior officers (which includes directors, company secretaries and senior managers) of a body corporate can also be convicted of an offence under the Act where they are deemed to have given their consent or connivance to giving or receiving a bribe or bribing a foreign public official (section 14, Bribery Act). This would likely include omitting to act to prevent bribery. However, senior officers cannot be held personally liable for an organisation's failure to prevent bribery under section 7 of the Act.

Territoriality

The Act has significant extra-territorial reach. Sections 1, 2 and 6 apply to acts or omissions that take place in the UK, and also capture bribery that takes place outside the UK (which would constitute an offence if carried out in the UK) where the person offering, etc., the bribe has a "close connection" with the UK (for example, where a company is incorporated

under the law of any part of the UK or is resident in the UK) (section 12).

The section 7 offence applies to bodies incorporated in the UK or carrying on a business, or part of a business, in the UK, regardless of where the bribery takes place. As a result, the section 7 offence will apply to overseas companies with only a minor presence in the UK. There is no requirement for the 'associated person' to have any connection with the UK. Whether organisations formed outside the UK carry on a business in the UK will be determined by the courts. However, the UK Government would not expect, for instance, that the mere fact that a company is admitted to the UKLA's Official List and to trading on the London Stock Exchange will qualify it as carrying on a business in the UK. Similarly, having a UK subsidiary alone would not be expected to comprise carrying on a business, because the subsidiary can act independently of its parent company. To reiterate, it seems that only where a subsidiary is giving or taking a bribe on behalf of its parent or similar such conduct, will the parent be implicated.

Penalties

The potential consequences of being convicted of a bribery offence include criminal penalties for both individuals and companies. Companies can receive an unlimited fine, and individuals face up to ten years imprisonment and/or an unlimited fine on conviction.

Fines for companies are likely to be heavy. A recent judgment in the Crown Court, against a company that had bribed foreign public officials, stated that fines for corruption should be in the tens of millions of pounds or more (*R v Innospec* [2010]: as per Lord Justice Thomas).

A director convicted of a bribery offence is also likely to be disqualified from holding a position as a director for up to 15 years.

Ways to avoid breaching the Act

The Serious Fraud Office published guidance on its approach to prosecutorial decision making under the Act, which is useful for companies conducting a risk assessment on how prone they are to infringing the Act, the likelihood of being prosecuted if they do and what they can do to minimise the risk. Suggested areas for implementation of procedures include: internal auditing of all business locations at regular intervals; rapid investigation of alleged breaches of policies; review of employment contracts to ensure that the organisation's position is protected in the event of a breach

by an employee; and due diligence on business partners and contracts.

Risks for a purchaser

Although a purchaser will not be liable for corrupt acts of the target company, or relating to the target business, that took place before the acquisition (the Bribery Act does not have a concept of successor liability), there are risks for a purchaser acquiring a business which has potentially been involved in corrupt practices, such as future prosecution of the target company and loss of value, reputation and revenue.

If corruption continues to take place after completion, the purchaser could also face liability under section 7 of the Act for failure to prevent bribery (subject to the adequate procedures defence).

Thorough due diligence to identify risks is therefore essential and appropriate warranties and conditions should be inserted into the sale and purchase agreement; a price adjustment and exclusion of 'tainted' assets should be considered where appropriate.

Bribery Act v US Foreign Corrupt Practices Act (FCPA) – How do they measure up?

Although the Bribery Act is similar in many respects to the existing anti-bribery provisions of the FCPA, overall, the Bribery Act is considered to be broader and more robust than the FCPA. The main differences are as follows:

- (i) **Private/Public** – The FCPA focuses on acts of bribery relating to foreign governmental officials, whereas the Bribery Act is further reaching as it covers any form of bribery, i.e., bribery of private individuals as well as public officials.
- (ii) **Receipt of Bribes** – The Bribery Act not only bans the actual or attempted bribery of private individuals and public officials but also prohibits the receipt of bribes. The FCPA contains no such provision.
- (iii) **Corporate Offence** – The Bribery Act creates a strict liability offence of failing to prevent bribery. Under the Bribery Act, companies will be liable if anyone acting under its authority commits a bribery offence. Such persons can include employees, consultants, agents, subsidiaries and joint venture partners. The only defence is where a company has adequate procedures in place to prevent bribery offences. The FCPA does not contain any strict liability

offences. This corporate offence has extra-territorial application and applies not only to UK corporate entities, but also to overseas companies who carry on business in the UK (even where it may do so in limited circumstances, which would include through a branch or representative agent or office).

(iv) **Criminal Penalties** – The Bribery Act has more severe criminal penalties than the FCPA. Whilst the Bribery Act allows UK prosecutors to impose an unlimited fine and a prison sentence of up to 10 years, the FCPA provides for company fines of up to \$2 million per violation of the FCPA and fines of up to \$250,000 on individuals per violation, as well as up to 5 years imprisonment. With wilful violations of the Books and Records and Internal Control provisions resulting in fines to companies of up to \$25 million and imprisonment of up to 20 years for individuals, the US provisions are, nevertheless, severe.

(v) **Facilitation Payments** – The FCPA has a specific exception for low level facilitation payments where payments are made which are lawful under written law of the local country or reasonable and bona fide expenditures relating to a contract. The Bribery Act has no such exception.

Action points for businesses with connections to the UK

The following should be borne in mind by businesses which have dealings with the UK:

- (i) Businesses should not assume that existing anti-corruption policies will be wholly sufficient for the Bribery Act. Any business with a connection to the UK needs to revisit its anti-corruption policy in light of the Act.
- (ii) Businesses should start with a risk assessment to identify any vulnerable aspects of the business which could fall foul of the Act.
- (iii) Particular issues to bear in mind if a business has a business presence in the UK further include:
 - the need for adequate procedures;
 - an anti-corruption policy needs to address risks of bribery in the private sector (as well as the public sector);
 - a policy must address the receipt of bribes as well as payment of bribes;
 - facilitation payments cannot be permitted;

- the need for controls over “associated persons” – ask contractors to implement anti-bribery procedures with their sub-contractors and so on.

If you wish to have further information on this update or wish to discuss how it may potentially have an impact on your business, please feel free to contact the following:



Bill JAMIESON
Partner
Head, English Law
DID: +65 6349 8680
Fax: +65 6323 8282
Email: billjamieson@cnplaw.com

Author & Contributor:



Lee HOWES
Foreign Associate
Email: lhowes@cnplaw.com

This update is provided to you for general information and should not be relied upon as legal advice.