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# The UK Bribery Act 2010: The Implications For Businesses Operating In Asia

## Introduction

The extensive jurisdictional reach of the UK Bribery Act 2010 (the "**Act**"), when it is finally implemented, will have significant implications for businesses operating in Asia which have a UK connection and for British nationals and citizens living in Asia. In particular, as dealt with in detail later:

* A new strict liability corporate offence of failure to prevent bribery may be committed by a company (wherever it is incorporated or formed) which "carries on a business or part of a business" (a term which is not defined in the Act) in the UK. The offence may apply to bribery conducted anywhere in the world by a person with no connection to the UK. The offence applies also to UK incorporated companies irrespective of where they carry on business or where the bribery occurs. The offence is triggered if a person associated with the company bribes another person, intending to obtain or retain business or a business advantage for the company. A person is " associated with a company" if he performs services on behalf of or for the company, potentially catching a company's agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers.
* The Act also has serious implications for individuals as it gives the UK courts jurisdiction over bribery committed anywhere in the world by a person with a "close connection to the UK" (the definition of which includes British nationals and citizens).

Implementation of the Act, which was due to take place in April 2011, has been delayed for a second time and there is as yet no set date for when it will come into effect. The reasons for the delay appear to be twofold. First, the Ministry of Justice ("**MOJ**") has stated that it requires more time to complete the guidance as to the "adequate procedures" companies can put in place to prevent bribery (which will be a defence to the corporate offence of failure to prevent bribery). This guidance is required by the Act and was due for publication in January 2011. The MOJ has also confirmed that the Act will not be implemented until three months after publication of the guidance.

The Act is apparently also being reviewed as part of a Growth Review being conducted by the British Government, an initiative which aims to reduce the regulatory burden on businesses in Britain. A spokesman for the Prime Minister said of the Growth Review position on the Bribery Act: "The Growth Review is ensuring that every Government department is doing everything it can to identify the obstacles for investment and help the country's economy to grow." However, when asked if the Prime Minister was sympathetic to criticisms of the Act, the spokesman said that "The Government is clear that corruption should not be considered an acceptable way to win business and the UK stands alongside the Organisation for Economic Co-operation and Development countries, all of whom have criminalised foreign bribery."

This note contains a summary of our understanding of the principal features of the Act. Please note however that Charltons does not advise on English law and that this note is provided for information purposes only and should not be relied upon.

## Background

The Act represents a considerable extension of the existing UK law relating to bribery and corruption, prompted by criticism of the UK’s regulatory framework in this area by the Organisation for Economic Cooperation and Development ("**OECD**"). UK law in this field is inconsistent with the OECD Bribery Convention, which the UK ratified in 1998. In response to criticism, particularly of the UK's handling of the BAE corruption case, a process of reform was commenced by the Law Commission in 2008. This led to the drafting of the Bribery Bill, which was placed before parliament in November 2009. The Bribery Act received Royal Assent on 8 April 2010. The Act was originally to enter into force in October 2010, before being delayed until April 2011. As set out above, implementation of the Act has now been delayed for a second time.

Prior to the passing of the Bribery Bill into law, there was a common law offence of bribing a public official and a number of statutory offences involving the bribery of a public agent or official. Together these offences are known as the Prevention of Corruption Acts 1889 to 1916 and they encompass the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Among the problems apparent under the old mixed common law and statute regime was the difficulty of convicting a company of bribery, due to the requirement to prove that a senior manager was the controlling mind and will behind the offence. Additionally, a transaction that was completely private and involved no public official was beyond the scope of the old bribery offence, save where the bribe was made to an agent acting for another person.

## The Offences Under The 2010 Act

The new Act contains four categories of offence:

* A general offence of offering, promising or giving a bribe to another person
* A general offence of requesting, agreeing to receive or receiving a bribe from another person
* A specific offence of bribing a foreign public official
* A strict liability corporate offence of failing to prevent bribery

The scope of the Act is very broad, as the offences are widely defined and the possibility for extra territorial reach is significant. Where offences are committed in breach of the terms of the Act, Section 11 provides for criminal sanctions for organisations and individuals alike. For individuals, a maximum prison sentence of ten years and/or an unlimited fine can be imposed. For companies, an unlimited fine can be imposed. No guidance has yet been published on the likely scale of the fines to be imposed on commercial organisations, but a recent Crown Court decision, regarding a company that had bribed foreign public officials, stated that fines for corruption should be in the tens of millions or more.

### Section 1: Offence of bribing another person

An offence is committed under section 1 of the act where a person (P) offers, promises or gives a financial or other advantage (the term "financial or other advantage" is not defined) to another person in the following two scenarios:

* Case one, where P intends the advantage to bring about an improper performance of a relevant function or an activity by another person or to reward such improper performance (section 1(2)).
* Case two, where P knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity (section 1(3)).

It should be highlighted that in case one it is irrelevant whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned (section 1(4)). Also in either case, the advantage can be offered, promised or given by the person accused of bribery himself or through someone else, therefore ensuring that the offence applies to the payment of a bribe through an agent (section 1(5)). Concerns have been expressed regarding the wide drafting of this section, encompassing as it does an individual who does not act corruptly, which is required by the current law. However the government has been reluctant to alter the wording of the section to alleviate its strictness, stating that it prefers to rely instead on the appropriate exercise of prosecutorial discretion.

### Section 2: Offences concerning being bribed

Section 2 relates to offences where the offender is the target of a bribery attempt. There are four different situations where a person, R, will be guilty of committing an offence in respect of receiving a bribe, which apply where:

* R requests, agrees to receive or accepts a financial or other advantage:
  + intending that a relevant function or activity should be improperly performed by R or another (section 2(2));
  + the request, agreement or acceptance is of itself an improper performance of a relevant function or activity (section 2(3));
  + as a reward for improper performance of a relevant function or activity by R or another (section 2(4)); or
* R or another performs a relevant function or activity in an improper manner, in anticipation of or in consequence of R requesting, assenting to receive or accepting a financial or other advantage (section 2(5)).

The connection between the advantage accrued and the improper performance of the function can therefore come in three guises:

* R's aim may be for the improper performance to occur as a result of the request, agreement to receive or acceptance of the advantage.
* Receiving, agreeing to receive or accepting the advantage may amount intrinsically to the improper performance.
* The advantage may be a reward for the improper performance

The benefit need not accrue to R and the request, agreement or acceptance can be through a third party, thus ensuring that using an agent is not a method by which one can evade the constraints of the legislation.

It should be highlighted that in the case of sections 2(3) to (2(5), it is irrelevant whether R is aware or believes that the performance of the function or activity is improper. This lack of a requirement for subjective intent or actual knowledge has been a source of some concern for business leaders, but has been defended by UK legislators as a key step in changing the culture of bribe taking prevalent in some sectors of the commercial world. This position may be contrasted with the knowledge requirements for a conviction under section 1 above, where the individual giving the bribe must intend that the carrying out of R's duty be improper due to the benefit offered or conferred.

### Sections 3, 4 and 5: Improper Performance and Relevant Function or Activity as they apply to Sections 1 and 2

Both general offences relating to the making and receiving of bribes are based around the concept of "improper performance". "Improper Performance" in section 4 of the act means performance (or non performance) of a public or private function, which breaches the expectations of good faith or impartiality, or violates a duty of trust. This concept is to be applied using an objective test, based on the expectations of a reasonable person in the UK regarding the activity in question.

Sections 5 (1) and (2) concern the difficult issue of the effect of local customs on reasonable expectations of proper performance. When assessing what a reasonable person in the UK would expect where the performance is not governed by UK law, no local custom or practice should be taken into account, save where it is permitted or demanded by the written law of the country or territory in question.

The term "Written law" in the Act relates to law found in any written constitution or provision made by or under legislation, or any judicial decision applicable to the country or territory concerned and which appears in published written sources (section 5(3)).

"Relevant function or activity" is defined in section 3. It is a broad definition and can relate to all functions of a public nature, all activities linked with a business (which includes a trade or profession (section 3(7)), any activity undertaken in the course of a person's employment and any activity performed by or on behalf of a body of persons (whether corporate or unincorporated). A further requirement is that an expectation exist that the functions are performed in good faith or impartially, or that the individual responsible for them is in a position of trust (sections 3(3), 3(4) and 3(5)).

### Section 6: Bribery of Foreign Public Officials

Although the new bribery offences in sections 1 and 2 have substantial extra territorial effect, the Act also creates a new specific offence of bribing a foreign public official. The new offence is clearly influenced by the OECD Anti-Bribery Convention, the terms of which it appears to be modeled on. Sections 6(5) and 6(6) give a flexible definition of foreign official, encompassing government officials and those working for international organisations. The scope of the offence does not cover accepting bribes, only offering, promising or giving them. The offence can be reduced to three constituent parts:

* The briber must intend to influence the foreign public official in his capacity as foreign public official, including any failure to exercise those functions and any use of his position, even if he does not have authority to use the position in the manner in question;
* The briber's intention must be to obtain or retain business or a benefit in the conduct of business, which includes anything that is done in the course of a trade or business;
* The briber must directly or via a third person, offer, pledge or provide any financial or other advantage to the foreign official or to another person at the foreign official’s request.

However it should be noted that the offence is not borne out if the foreign official is allowed or obliged, in accordance with applicable written local law, to be influenced in his capacity as a foreign public official by the offer, promise or gift. The wording of the offence is such that there is no requirement for the briber to intend for or be aware that the official has acted improperly, he need merely plan on influencing the official. Additionally it is not necessary for the official to act improperly in order for the offence to be complete.

#### Facilitation Payments

The US Federal Law Foreign Corrupt Practices Act ("**FCPA**") 1977 makes an exception in its anti bribery regime for small "facilitation payments" rewarded to officials in order to streamline official procedures, a widespread practice for those doing business in parts of the developing world. The Act contains no such exception, making all payments of this nature, regardless of size or local custom, illegal. This stance has been criticized for ignoring commercial reality, but the UK government has declined to retreat from its zero tolerance approach, preferring to deal with difficult cases through the use of prosecutorial discretion.

#### Corporate Hospitality

Although the government has accepted that the new legislation is not intended to criminalize proportionate and legitimate hospitality, including that offered to foreign public officials, it has retained the ability to bring proceedings under the Act against those who indulge in excessive displays of hospitality in order to undermine the recipient's duties of good faith, impartiality or trust which are owed to his employer. Again, this is an area in which prosecutorial discretion will play a large part.

### Section 7: Failure of Commercial Organisations to Prevent Bribery

Perhaps the most contentious of the four categories of offences is section 7, which attaches criminal liability to a “relevant commercial organisation” when a person associated with that organisation (within the meaning of section 8 (1), discussed below in relation to the extra territorial scope of the section 7 offence) bribes (within the meaning of sections 1 and 6) another person, intending to obtain or retain business or a business advantage for the organisation. The offence can be committed in the UK or overseas.

There is no negligence test to establish liability in connection with this section, as it is a strict liability offence, with the only defence for the commercial organisation being an ability to show that it had "adequate procedures" in place to prevent persons associated with the organisation from committing bribery (section 7(2)). The interpretation given to "adequate procedures" when establishing the defence, as well as the impact of extra territorial application, are vital factors when considering this section and these are discussed separately below.

## The Extra Territorial Effct Of The Act

### Section 12: The Territorial Application of the General Bribery Offences of Sections 1 and 2 and the Section 6 Offence of Bribing a Foreign Public Official

Under section 12 (1) of the Act, an offence has been committed under sections 1, 2 and 6, if any act or omission which forms a component of the offence occurred in the UK. It should be emphasised here that once any of the acts making up the offence transpire in the UK, it is irrelevant where any of those involved reside, are domiciled or are incorporated.

Sections 12 (2) and (3) of the Act relate to the extra territorial application of sections 1, 2 and 6. These sections state that proceedings may be taken in the UK if:

* a person, who has a "close connection" with the UK,
* acts or omits to act in a manner outside the UK that would be an offence under sections 1, 2 or 6, if that act or omission had taken place in the UK,
* even if no such act or omission actually did occur in the UK.

The "close connection" with the UK must exist at the time of the act or omission. The effect of this section is that action may be taken under the Act against a person with a close connection to the UK, even if no constituent part whatsoever of the offence occurred in the UK. Section 12 (4) lists those people regarded as having a close connection with the UK as follows:

* A British citizen.
* A British overseas territories citizen.
* A British national (overseas).
* A British overseas citizen.
* A person who under the British Nationality Act 1981 is a British subject.
* A British protected person within the meaning of the British Nationality Act 1981.
* An individual ordinarily resident in the UK.
* A body incorporated under the law of any part of the UK
* A Scottish partnership.

### Territorial Application of Section 7 Offence of Failure of a Commercial Organisation to Prevent Bribery

As discussed above, section 7 attaches criminal liability to a "relevant commercial organisation" when a person associated with that organisation bribes (within the meaning of sections 1 and 6) another person, intending to obtain or retain business or a business advantage for the organisation. The extra territorial effect of the offence stems from the meaning attached to the phrase "relevant commercial organisation" in the Act. Under section 7(5), the term "relevant commercial organisation" is defined as any of the following:

* A body that is incorporated under the law of any part of the UK and that carries on a business anywhere (whether in the UK or elsewhere).
* Any other body corporate (wherever incorporated) that carries on a business, or part of a business, in any part of the UK.
* A partnership that is formed under the law of any part of the UK and that carries on a business anywhere (whether in the UK or elsewhere).
* Any other partnership (wherever formed) that carries on a business, or part of a business, in any part of the UK.

It should be underlined at this point that the Act does not provide a definition for the term "carries on a business or part of a business". This has serious implications for international businesses when one considers that an offence under section 7 is committed by the organisation, C, if A, a person associated with C, commits an act of bribery. According to section 8 (1) of the Act, a person is associated with a "relevant commercial organisation" if that person "performs services" on behalf of or for the organisation. Under section 8 (4) of the Act, the determination as to whether or not A is a person who performs services for or on behalf of C is made following consideration of all the surrounding circumstances, and does not simply rely on the nature of the relationship between A and C. This wide drafting could cover such actors as agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers.

No territorial limit is placed on either the location of A, be that place of residence, incorporation or formation, or the location where the act of bribery actually occurs. An offence can be committed without A ever being a UK resident, UK national or incorporated in the UK, or without him ever actually committing an act of bribery in the UK. Additionally, C can be prosecuted under section 7 without A ever being prosecuted for his role in the bribery under section 1, 2 or 6. The result of these widely drafted sections is that C, a commercial organisation incorporated or formed in the UK, can be subject to an action under section 7 in respect of A, a person with no connection to the UK committing bribery wholly outside the UK’s borders, as long as A can be said to be providing services to C. These services need not be performed in the UK, and could be performed anywhere in the world.

Furthermore, a commercial organisation, C, formed or incorporated outside the UK, which "carries on a part of its business" within the UK, can be prosecuted under section 7 with regard to bribery which occurs wholly outside the UK. This is despite the fact that the act of bribery was committed by A, a person with no link to the UK and who is "performing services" for C outside the UK. Additionally the advantage intended to accrue to C can be entirely outside the UK.

Therefore if, for example, a foreign incorporated company carrying on part of its business in the UK wishes to minimise the risks of prosecution, it should ensure that it has "adequate procedures" in place to prevent bribery on the part of persons associated with the organisation.

## The Adequate Procedures Defence Under Section 7 (2) And The Ministry Of Jusitice's Draft Guidelines

### The Adequate Procedures Defence

A "relevant commercial organisation" (C) has a defence from a charge of failure to prevent bribery, if it can show that it had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct (Section 7 (2)). However, the term "adequate procedures" is not defined in the Act, which leaves companies with considerable uncertainty as regards what is expected of them. Section 9 of the Act creates a statutory obligation on the Secretary of State to produce guidance on the matter, in order to aid and inform commercial organisations. The government issued a draft guidance (the "Guidance") on the adequate procedures defence in September 2010, as part of the consultation process. The 8-week consultation period ended on 8 November 2010. A government response, along with the final version of the guidance, was to be published in January 2011. However, as discussed above, this has been delayed.

### The Draft Guidance on the Adequate Procedures Defence

The aim of the Guidance is to assist commercial organisations of all sizes and forms to ensure that they are taking adequate precautions against the threat of bribery. It details six key principles for ensuring bribery does not occur, illustrating them via case studies. It is not a standalone document and is meant to form part of a wider framework of regulatory guidance, encompassing publications from the Financial Services Authority, the Serious Fraud Office and the City of London Police. Although the issue of whether an organisation actually has adequate procedures to prevent bribery is one of fact to be decided by the courts, organisations can place themselves in a stronger position by adhering to the recommendations contained in the Guidance.

### The Six Principles

The six principles upon which the Guidance is structured are not intended to create an exhaustive and mandatory set of factors guaranteeing that an organisation's procedures will be considered adequate under the Act. Rather they aim to assist organisations in understanding the kind of procedures they should put in place to guard against bribery. The Guidance explicitly recognises that different companies will require different procedures if they are to be considered adequate by the courts. In cognizance of this, the principles make suggestions and recommend factors to be taken into account by companies when developing and stress testing their anti bribery regimes.

#### Principle 1: Risk Assessment

The Guidance recommends that the company conduct regular self appraisals in order to better understand and measure the risk of corruption which it must confront. This process will allow a company to expend its resources in the most efficient way possible in its efforts to prevent corruption and bribery. The Guidance is clear that different companies will need to follow different procedures when assessing the adequacy of their protection against both internal and external risks. Company policy on corporate hospitality is a good example of an internal risk, while external risks may arise from the countries in which an organisation conducts business or the manner in which it makes charitable donations.

#### Principle 2: Top down commitment

This principle highlights the importance for leaders of an organisation, whether the board of directors, managing partners or senior management, of leading by example. They should establish and publicise a culture where corruption is not tolerated. It is noteworthy that the Guidance states that this zero tolerance culture towards bribery should be extended to an organisation’s business partners, without discussing what this may require a company to do as regards its relations with others.

#### Principle 3: Due Diligence

This principle relates to the responsibility on organisations to perform adequate due diligence checks on their business partners, in order to ensure that a relationship with them runs little risk in the way of bribery or corruption. This is potentially a very broad responsibility and ties in with the zero tolerance approach to business partners noted above. When assessing business partners, regard should be had to their location, operating history, personnel and the nature of the business opportunity involved.

#### Principle 4: Clear, practical and accessible policies and procedures

This principle refers to the form in which an organisation presents its policies, highlighting the need for them to avoid ambiguity and obtuseness. The Guidance notes that anti bribery policies must be formulated in a manner which takes account of the different roles played by different individuals within the organisation, from the senior management and directors to "all employees and all people and entities over which the commercial organisation has control." This last statement, regarding entities over which the organisation has control, has caused some confusion as it is unclear whether an organisation need extend its anti bribery policies only to those entities over which it does exert control, or whether there is a wider application for these policies. If the answer is the latter, how is an organisation to implement such a requirement? The Guidance does list, without further explanation, a number of issues which an organisation's anti corruption framework should address. These include an explicit ban on bribery, advice on relevant legal regimes, information on the whistle blowing process, instruction on the giving of political donations, charitable gifts, hospitality and expenses, and advice on how to deal with blackmailers and extortionists.

Additionally, the Guidance highlights the importance of an organisation's existing self-regulatory functions in combating bribery, such as the audit and financial controls. Furthermore, the Guidance recommends the formulation of a set of procedures to be implemented should bribery actually occur.

#### Principle 5: Effective Implementation

This principle underlines the significance for an organisation of ensuring that its anti bribery policy is implemented in a practical and efficient manner and is a key part of the organisation's culture. The importance of assimilating the anti bribery policies into the day-to-day realities of running the organisation, from a management and employee viewpoint, is highlighted. The scale of the framework for implementation will depend largely on the scale of the organisation in question, but some of the suggestions for effective implementation mentioned in the Guidance are an efficient division of responsibility, the use of training courses to familiarise staff with anti bribery procedures, the publication of these procedures both internally and externally and a well-organized internal reporting system.

#### Principle 6: Monitoring and Review

The final principle emphasises the importance of an effective monitoring and review system, in order to ensure compliance with the organisation’s anti bribery regime, and to identify and resolve any problems that arise. Suggestions are made by the Guidance regarding how to structure this system of monitoring and review, such as effective financial and auditing controls, financial monitoring, bribery reporting and incident management procedures as well as periodical reporting to the audit committee, board of directors or equivalent body. Once again the scale of the system employed depends on the size of the organisation, and once again the Guidance makes many suggestions and imposes no requirements. The importance of the audit is however underlined, for large and small organisations alike.

### The Guidance's Illustrative Scenarios

Annex B to the Guidance is composed of five illustrative scenarios, designed to assist organisations in putting the six principles into practice. All of the scenarios involve foreign officials or entities and consist of a series of questions which organisations should ask themselves, if one of these scenarios should arise. The usefulness of the scenarios is undermined by the fact that they all start from the position that a wrong has been committed, with a prosecutor examining a number of procedures to assess their adequacy, as opposed to instructing businesses on how to avoid such situations in the first place. The scenarios cover agents and middlemen, hospitality and promotional expenditure, business partners (including joint ventures and consortia), facilitation payments and political and charitable donations.

### The Guidance: Further Information about the Act

Included in the Guidance document is a section entitled "Further Information about the Act", wherein the MOJ summarises some significant aspects of the Act and addresses some other important issues. These issues take in the use of prosecutorial discretion, the making of facilitation payments, corporate hospitality and spending on company promotions. The topic of corporate hospitality and promotional expenditure is an important one for business, as these are a regular part of how many companies conduct their affairs and the prospect of their being criminalised under the Act is a most unwelcome one. In this section of the Guidance, the MOJ state that "reasonable and proportionate hospitality and promotional expenditure" are unlikely to constitute a breach of the Act, due to the absence of intent to influence or secure a business advantage required for a prosecution under section 6. As noted above, the Act contains no carve out regarding facilitation payments, but intends to rely on prosecutorial discretion to deal with difficult cases. Quite how this discretion is to be exercised is unclear, although answers may be forthcoming in the form of the Joint Guidance on the Act from the Serious Fraud Office ("SFO") and Director of Public Prosecutions ("DPP"). This Joint Guidance aims to guarantee consistency in enforcing the Act between those two bodies and the police. Finally, it should be noted that the legal status of this "Further Information" section, as regards its relationship with section 9 of the Act, remains unclear.

### The Guidance: Conclusion

The approach taken by the draft guidance is a broad one, focusing on principles rather than rigid rules. This method has its advantages, as it guarantees a degree of flexibility, which is required to accommodate the various forms of commercial organisations which are to be regulated by the Act. Any attempt to impose a narrower rule based approach would cause difficulties, as it may make compliance more onerous for small organisations as opposed to large ones and vice versa. However the drawback of the approach taken by the Guidance is that it fails to give companies definite advice on how to ensure that they employ "adequate procedures" under section 7 of the Act. Neither the principles nor the illustrative scenarios are sufficiently detailed to permit companies to be sure of compliance. The Guidance is likely to be of more use to small rather than large companies, as large ones will probably already have an anti-bribery regime in place. It is to be hoped, that with the publication of the final MOJ Guidance and the Joint Guidance on the Act by the SFO and DPP, commercial organisations will be in a more informed position as regards the standard to be met in order to create an "adequate" anti bribery framework, thereby allowing them to avail of the section 7 defence. Finally, the Growth Review’s findings on the Act in its entirety may also have an effect on the "adequate procedures" defence.

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