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# UK Bribery Act Comes Into Force On 1 July 2011: The Implications For Businesses In Asia

## Introduction

The UK Bribery Act (the **Act**) comes into force on 1 July 2011. The Act represents an attempt on behalf of UK legislators to improve the law relating to bribery and corruption, an attempt prompted by increasing 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. The Act was originally to enter into force in October 2010, before being delayed until April 2011. However the implementation of the Act was then delayed for a second time, due to the British Ministry of Justice requiring further time to complete its Guidance (the **Guidance**) regarding the procedures which companies can implement to prevent themselves, or their employees, breaching the terms of the Act. This newsletter briefly sets out the main features of the new legislation, including the effect it may have on those doing business in Asia. A far more detailed examination of the Act is available in our [February](/newsletters/hklaw/en/2011/111/nl-hklaw-20110214-111.html) and [April](/newsletters/hklaw/en/2011/118/nl-hklaw-20110408-118.html) newsletters.

## Key Aspects Of The New Legislation

The Act contains four categories of offence:

* The Section 1 general offence of offering, promising or giving a bribe to another person
* The Section 2 general offence of requesting, agreeing to receive or receiving a bribe from another person
* The Section 6 specific offence of bribing a foreign public official
* The Section 7 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. It 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). Furthermore, where offences are committed in breach of the terms of the Act, Section 11 provides for criminal sanctions for organisations and individuals alike.

As regards the controversial elements of the Act concerning the outright criminalisation of facilitation payments and the possible criminalisation of corporate hospitality, the Guidance stated the following:

* Once corporate hospitality and promotional expenditure are reasonable, bona fide and proportionate in all the circumstances, they will not fall within the scope of the Act.
* There will be no carve out from the Act for facilitation payments, although the Guidance intimates that prosecutorial discretion may be sensitive in this area

### The Effect of Section 7 on Businesses in Asia

Perhaps the most contentious of the four categories of offences is section 7, the new strict liability corporate offence of failure to prevent bribery, which 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.

However the concerns of companies around the world who maintain business links with the UK were alleviated somewhat by the Guidance. The Guidance confirms that although the final determination of the meaning of the crucial term "carries on a business or part of a business" is to be made by the courts, the expectation is that organisations without a demonstrable presence in the UK will not come within the scope of this term, with the Guidance stating that a listing on the London Stock Exchange or the presence of a subsidiary in the UK will not, of themselves, be enough to warrant a finding that an organisation is "carrying on a business" in the UK.

#### The Adequate Procedures Defence under Section 7 (2)

A full defence to a charge under section 7 is available to an organization which can demonstrate, that regardless of an actual offence of bribery having occurred, it had adopted adequate procedures designed to prevent such instances of bribery from taking place. The Guidance confirms that the standard of proof which the organisation must satisfy to establish the defence is the balance of probabilities. The Guidance sets out six non-exhaustive principles on which a company can base its anti-bribery framework, but stresses that their key point is that measures put in place by an organisation should be proportionate to the particular risks faced by that specific organisation.

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