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The UK Bribery Act 2010

How it affects your business

Presentation for UKTI in Almaty, Kazakhstan

Agenda

1. Introduction
2. Application
3. Main provisions of the Bribery Act
 - a. Bribing another person and being bribed
 - b. “Relevant function or activity”
 - c. “Improper performance”
 - d. Corporate offence of failing to prevent bribery
4. Conclusions?
5. The UK Bribery Act and the US FCPA

- Bribery Act came into force on 1st July 2011
- Four new offences:
 1. bribing another person
 2. being bribed
 3. bribing a foreign public official
 4. a corporate offence of failing to prevent bribery
- Sanctions? **Unlimited fines** in certain cases

- **Who is affected?**
 - a. all UK and foreign companies doing business in the UK
 - b. all UK businesses trading overseas
example - Kazakhstan
- **Where might an offence take place?**
 - a. UK
 - b. overseas (if the offender has a “close connection with the UK”)

- **Exception**

No such connection with the UK is required in relation to corporate offences of failing to prevent bribery.

→ extended liability for commercial organisations

(place of action or omission is immaterial)

- **Bribing another person**
 - P offers, promises or gives a financial or other advantage
 - intending to induce the receiver to perform a relevant function or activity improperly
 - as a reward for the improper performance of such activity or function
 - P knows that the acceptance of the advantage in itself constitutes the improper performance of a relevant function or activity

- **Being bribed**
- Receiver requests, agrees to receive or accepts a financial or other advantage
 - where R intends that a relevant function or activity is performed improperly; or
 - where requesting the advantage itself is the improper performance of a relevant function or activity; or
 - as a reward for the improper performance of such function or activity
- Receiver performs relevant activity or function improperly in anticipation of requesting or accepting a financial or other advantage

- **“Relevant function or activity”**
 - a. any function of a public nature
 - b. any activities connected with a business
 - c. any activity performed in the course of a person’s employment
 - d. any activity performed by or on behalf of a body of persons whether they are incorporated or unincorporated
- **“Improper performance”**
 - a. relevant function or activity is performed in breach of a relevant expectation
 - b. failure to perform the function in itself is a breach of a “relevant expectation”

“Expectation”

→ what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned

Any local custom or practice will be disregarded unless those are permitted by the written law of the country concerned (→ very rarely)

Means – local custom is not a defence

- **Corporate Hospitality**
 - **acceptable**
 - a. for legitimate commercial purposes
 - b. if it is proportionate and reasonable
 - c. if it does not exceed costs for standard transportation and accommodation
 - **unacceptable**
 - a. if disproportionate and lavish
 - b. where there is no technical content or any business discussion in the meeting

Main provisions

- **Facilitation payments**
 - **acceptable**
 - a. if made under “duress”
 - b. if necessary to protect life, limb and liberty
 - **unacceptable**
 - a. if made to public officials to secure or expedite performance of routine or necessary action
 - b. if made repeatedly or premeditated

- **Corporate offence of failing to prevent bribery**

A commercial organisation is guilty of an offence if a person, associated with C, bribes another person (in the UK or overseas).

Commercial organisations include:

- Private limited companies incorporated in the UK
- Companies incorporated outside UK which carry out business in the UK
- Partnerships

- **The defence**

→ “adequate procedures designed to prevent bribery”

- a. establishing a culture where bribery is never acceptable
- b. risk assessment
- c. due diligence
- d. communication and training
- e. monitoring and review

Examples for possible measures:

- code of conduct with a clear anti-corruption element
- written guidance on gifts, corporate hospitality, facilitation payments.....
- internal controls and implementation of whistleblowing procedures to prevent bribery
- consider including standard clauses in commercial contracts prohibiting bribery and corruption

- No company doing business in and with the UK can afford to ignore the Bribery Act 2010
- Commercial organisations should review their existing procedures and policies to ensure compliance under the Act
- Standard terms should include provisions and adequate measures against bribery

Commercial bribery in general

- a. The Foreign Corrupt Practices Act does not cover bribery without the involvement of a foreign official

- b. However, such conduct may be addressed under other US statutes in some cases, e.g. under the Travel Act

- c. "Foreign official" for the purposes of the FCPA has a broader meaning than "foreign public official" in the Act.

The Act vs. the FCPA



- **Failing to prevent bribery**

Bribery Act	FCPA
<ul style="list-style-type: none">- Companies are held liable if they fail to implement adequate measure to prevent bribery- Senior officers are also guilty if an offence was committed by their company with their “consent or connivance”	<p>No specific offence for failing to prevent bribery, however:</p> <ul style="list-style-type: none">- low threshold for corporate criminal liability in the US- conviction for willful blindness

- **Accounting requirements**

Bribery Act	FCPA
<p>No accounting requirements, however provisions of the Companies Act 2006</p> <p>All limited and unlimited companies must keep adequate accounting records.</p> <p>→ Failure to do so is a criminal offence for every company officer in default.</p>	<p>US issuers and their foreign subsidiaries are required to:</p> <ul style="list-style-type: none">- keep accurate books, records and accounts- devise and maintain sufficient internal accounting controls to ensure such accuracy <p>→ Failure to do so is a strict liability offence</p>

The Act vs. the FCPA



- **Scope of application**

Bribery Act	FCPA
<ul style="list-style-type: none">- UK companies, partnerships and nationals- Foreign individuals or corporate bodies resident or carrying on a business in the UK or elsewhere if there is a close connection with the UK- any individual or corporate body carrying out bribery in the UK	<ul style="list-style-type: none">-US issuers, US and foreign companies, US nationals acting within the territory of the US or abroad- Parent companies are also responsible for ensuring the compliance of any foreign subsidiaries over which they have a sufficient degree of control.

- **Penalties and consequences**

Bribery Act	FCPA
<p>- For individuals: On conviction on indictment, up to ten years imprisonment and/or an unlimited fine.</p> <p>- For companies: On conviction on indictment, an unlimited fine (this includes for an offence under section 7 of failing to prevent bribery).</p>	<p>- For individuals: US\$ 5 million per wilful violation as well as up to 20 years imprisonment</p> <p>- For companies: US\$ 25 million per wilful violation</p>

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