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United Kingdom's Bribery Act 2010 from the perspective of non-UK entities

As Kenneth Clarke, the Secretary of State for Justice in March 2011 wrote in the foreword to the Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing¹ “bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted”. In order to fight with such behaviors, the UK introduced the most rigorous act on bribery². The aim of this article is to describe this regulation that came into force on July 1, 2011. The act affects not only British companies, but also non-UK-based entities. There are five key aspects of the enforcement of this legal regulation that should be discussed from the perspective of non-British organizations, namely: the application of the Bribery Act 2010 to the entities outside the UK, the differences between the legislation introduced by the UK and the US, the actions and procedures that should be undertaken or introduced in order to protect the company from potential criminal liability, the limitations that the Act imposes on corporate entertainment and promotional expenditures, and finally the issue of facilitation payments.

¹ Available online: <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; later as the Guidance.

² J. Jordan, *Recent developments in the Foreign Corrupt Practices Act and the new UK Bribery Act: a global trend towards greater accountability in the prevention of foreign bribery*, „New York University Journal of Law & Business” 2011, no. 7.

The Bribery Act 2010 – general information

Until recently, international anti-corruption enforcement has been largely dominated by the US Foreign Corrupt Practices Act 1977³. This situation was changed when the UK introduced its Bribery Act⁴ in 2010. Later the differences between these two will be explained, but this section will focus on the UK's legislation. It lists following types of offences: two types of general bribery offences: offences of bribing another person⁵ (so called “active bribery”⁶ – offering, promising or giving any kind of advantages to another person) and offences relating to being bribed⁷ (so called “passive bribery”⁸ – requesting, agreeing to receive or accepting any kind of advantages from another person), bribery of foreign public officials⁹ and failure of commercial organizations to prevent bribery¹⁰. A relevant commercial organization is guilty of failure to prevent bribery if a person associated with this company (i.e. employee, agent, subsidiary, external contractor and any other person providing services to the company)¹¹ bribes another person intending to obtain or retain business for this commercial organization or intending to obtain or retain an advantage in the conduct of business for this entity. That is why, virtually any company doing business in the UK may be held accountable for improper payments made on its behalf, anywhere in the world, even in the absence of any further connection between the payment and the UK. An individual guilty of any of these offences is liable on conviction on indictment, to imprisonment (term depending on the actual offence committed) or to fine, or to both¹². Such liability may attach without regard to whether the payment was known to or authorized by the company¹³.

Application of the Bribery Act 2010 to non-UK entities

Application of the Bribery Act 2010 to UK-based entities is obvious. Simply, every company incorporated in the UK may be liable under the Bribery Act 2010 for

³ Later as the FCPA 1977; full text available online: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>.

⁴ Full text available online: http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

⁵ Defined and explained by the Section 1 of the Bribery Act 2010.

⁶ The Guidance, p. 8.

⁷ Defined and explained by the Section 2 of the Bribery Act 2010.

⁸ The Guidance, p. 8.

⁹ Defined and explained by the Section 6 of the Bribery Act 2010.

¹⁰ Defined and explained by the Section 7 of the Bribery Act 2010.

¹¹ The notion of the associated person is defined and explained in the Section 8 of the Bribery Act 2010.

¹² Penalties are introduced by the Section 7 of the Bribery Act 2010.

¹³ <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

improper payments made, authorized or accepted by its senior officials (which is defined as active or passive bribery). But this is not all. Also non-UK-based entities may fall under jurisdiction of this act. Such application is possible with respect to all commercial organizations that fail to prevent bribery. As explained in the Bribery Act 2010, "relevant commercial organization" means: a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom¹⁴. This, in essence means that a company that fails to prevent bribery risks strict criminal liability even if it *carries on only a part of business* in the UK, regardless of its place of incorporation or primary location. What is more, the UK authorities¹⁵ have indicated their intention to prosecute such offenses even where the improper payment has absolutely no connection of any kind to the UK. By contrast, the FCPA enacted by the UE, applies only to the conduct of US companies, citizens or permanent residents, or where at least some of the alleged misconduct takes place in the US.

Such jurisdiction of the Bribery Act 2010 may be very troublesome to many entities outside the UK as this country has developed various business ties with many nations, especially those in North America and in the European Union. But not all companies that have links to the UK will be encompassed by this Act. As the Guidance¹⁶ points out, "the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself is not enough to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a relevant commercial organization". This constitutes a difference between the UK and the US legislation as the FCPA's jurisdiction covers all companies listed on a US exchange. The Guidance¹⁷ also notes that simply "having a UK subsidiary would not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies. Nevertheless, it remains uncertain what degree of independence would be sufficient to persuade UK authorities that a subsidiary met this standard, but it can be anticipated that UK prosecutors will be aggressive in seeking to impose liability on a UK subsidiary's parent and its affiliates¹⁸.

¹⁴ The Section 7 of the Bribery Act 2010.

¹⁵ <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

¹⁶ The Guidance, p. 15–16.

¹⁷ The Guidance, p. 16.

¹⁸ <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

How to protect non-UK entities from the potential criminal liability?

The Bribery Act 2010 provides a complete defense to the offence of failing to prevent bribery in its Section 7. The commercial organization may protect itself if it has in place adequate procedures that will prevent persons associated with it from paying and accepting bribes. As UK authorities recognize in the Guidance¹⁹, “[t]he objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organizations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defense. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defense is also included in order to encourage commercial organizations to put procedures in place to prevent bribery by persons associated with them”.

What is more, the UK authorities responsible for enforcing the Bribery Act 2010 have issued Prosecution Guidance²⁰ stating that “a single instance of bribery does not necessarily mean that an organization’s procedures are inadequate. For example, the actions of an agent or employee may be willfully contrary to very robust corporate contractual requirements, instructions or guidance”.

The “adequate procedures” put into practice must follow six principles set out in the Guidance. By them, the adequacy of the implemented procedures will be evaluated. The Guidance elaborates on these principles²¹ and presents eleven case studies applying the principles to specific fact scenarios²². Those principles are in line with current best practices that are already being followed by many entities seeking to assure their compliance with the FCPA 1977.

Key points of the six principles are following.

The first principle is entitled as proportionate procedures²³. The Guidance²⁴ uses the term “procedures” to encompass both bribery prevention policies and procedures implementing them. According to this principle, adequate procedures in order to prevent bribery must be proportionate to the bribery risks that the company faces, and to the nature, scale and complexity of the company’s activities. Procedures must be clear, practical, accessible, effectively implemented and enforced.

¹⁹ The Guidance, p. 8.

²⁰ Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions, http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html; later as the Prosecution Guidance.

²¹ The Guidance, p. 20–31.

²² The Guidance, p. 32–43.

²³ The Guidance, p. 21–22.

²⁴ The Guidance, p. 21.

The second principle is entitled as top-level commitment²⁵. As the Guidance²⁶ explains the top-level management (understood as the board of directors, the owners of the company or any other equivalent bodies or people) of the commercial organization must be committed to prevent bribery as those at the top are in the best position to foster a culture within the organization in which bribery is unacceptable. Apart from active participation in developing of bribery prevention mechanism, the top management should also focus on internal and external communication of the commitment to zero tolerance to bribery. Effective formal statements that demonstrate top level commitment can include: a commitment to conduct business fairly, honestly and openly, consequences of breaching the procedures by employees or managers or articulation of the business benefits of rejecting bribery.

The third principle is entitled as risk assessment²⁷. In order to create adequate procedures, the commercial organizations must assess the nature and extent of their exposure to potential external and internal risks of bribery on its behalf. Potential external risks include: country risk, sectoral risk, transaction risk, business opportunity risk and business partnership risk²⁸. Commonly encountered internal risks include: deficiencies in employee training, skills and knowledge, bonus culture that rewards excessive risk taking, lack of clarity in the organization's policies on and procedures for hospitality and promotional expenditure and political or charitable contributions, lack of clear financial controls. The company's exposure to those risks must be re-evaluated, both periodically and as the company's business evolves.

The fourth principle is entitled as due diligence²⁹. The adequate bribery prevention procedures must consists of due diligence mechanism as it is both a form of bribery risk assessment and a mean of mitigating risk. Due diligence should be utilized to both internal and external risks. As the Guidance³⁰ sets out, due diligence should be conducted using a risk-based approach, which means it should be proportionate to the identified risks. In lower risk situations, the commercial organizations may decide that there is no need to conduct much in the way of due diligence. However, in higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations or general research on proposed associated persons. The Guidance sets out following examples of the risky situations: entering into such business relationships when local law or practice calls for the use of a local agent or into such business relationship that may be particularly difficult to modify or end once it is entered into.

²⁵ The Guidance, p. 23–24.

²⁶ The Guidance, p. 23.

²⁷ The Guidance, p. 25–26.

²⁸ The definitions of these types of risks are included on p. 26 of the Guidance.

²⁹ The Guidance, p. 27–28.

³⁰ The Guidance, p. 28.

The fifth principle is entitled as communication (including training)³¹. The adequate procedures cannot be only on paper. They must be also communicated to and understood by both internal and external audiences. Internal communication should include policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible “speak up” procedure that allows individuals to raise concerns about bribery on the part of associated persons.

The sixth principle is entitled as monitoring and review³². According to this principle, the commercial organizations need to establish ways of monitoring and evaluating the effectiveness of their bribery prevention procedures, and to modify them whenever necessary in response to changes in their operations, changes in the law or particular incidents experienced by the company or reported in the press.

Limitations on corporate entertainment and promotional expenditures

The plain language of the Bribery Act 2010 could be read to broadly prohibit all kinds of entertainment and promotional expenditures that are routinely made by most of the companies worldwide³³. But, as the UK authorities noted in the Guidance³⁴ “[b]ona fide hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalize such behavior. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes”. As the UK authorities further explained in the Prosecution Guidance, the standard introduced by the Bribery Act 2010 is essentially the same as the standard that is ordinarily applied under the FCPA 1977. Therefore there is no need to alter any existing FCPA-based policies on such expenditures. Of course, the prosecutors will evaluate each situation accordingly to all of the circumstances.

³¹ The Guidance, p. 29–30.

³² The Guidance, p. 31.

³³ <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

³⁴ The Guidance, p. 12.

Facilitation payments

Facilitation payments, as defined by the Guidance³⁵, are small bribes paid to facilitate routine government actions. The Bribery Act 2010 does not (unlike the US bribery legislation) provide any exemption for such payments. They are flatly prohibited. As the Prosecution Guidance notes, "there is no exemption in respect of facilitation payments. They were illegal under the previous legislation and the common law and remain so under the Act." The only difference is that the Bribery Act 2010 broadly subjects non-UK entities to these restrictions *for the first time*³⁶.

Notably, the UK authorities have expressed their intention to fight against facilitation payments whenever the UK entities are disadvantaged by such payments. In remarks made at a conference in February 2011, Chris Walker, the head of policy for the Serious Fraud Office gave such example. Two companies – one US and one UK – build factories in a remote area of a developing country, and local officials demand facilitation payments to activate telephone service. The US company uses the FCPA 1977's exception for facilitation payments and pays a bribe to obtain telephone service, while the UK commercial organization, in accordance with the Bribery Act 2010 refuses to do so and its factory remains shut. Mr. Walker said that the UK would carefully consider whether to prosecute the US company in this situation, because the UK company had been disadvantaged³⁷.

Differences between the UK Bribery Act and the US Foreign Corrupt Practices Act

The Bribery Act 2010 is in some respects similar to the US FCPA 1977. Both include a tough set of rules prohibiting corruption and bribery and both envisage strict corporate liability for such behaviors. Although their stated goals are similar, the rules of the FCPA 1977 and the Bribery Act 2010 are different in some respects. It is crucial for companies to acknowledge the distinctions between these two pieces of legislation which are set out below.

First difference that is worth mentioning regards the jurisdiction of both these acts. The application of both the FCPA 1977 and the Bribery Act 2010 is not confined to national territories. Both laws also can be applied extraterritorially, but the jurisdictional scope of the FCPA 1977 includes all companies listed on the US stock exchange and all cases of bribery committed on the US territory, whereas the Bribery Act 2010 is applicable when bribery is committed by the UK entities or

³⁵ The Guidance, p. 18.

³⁶<http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

³⁷<http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/>.

all entities closely connected³⁸ to the UK (irrespective of whether it is committed outside the UK).

Second difference is following. The FCPA 1977 criminalizes bribes paid or offered to a “foreign government official”, whereas the Bribery Act 2010 prohibits bribes paid to “any person” to induce them to act “improperly”. Hence, the UK legislation encompasses both public and commercial bribery.

Another difference deals with the nature of an offence. The FCPA 1977 prohibits only payment of a bribe (active bribery). While, the Bribery Act 2010 adopts a wider approach and criminalizes also receiving bribes (both active and passive bribery).

Further differences include corporate liability and the issue of facilitation payments (both explained above). The FCPA 1977 requires public companies to devise and maintain a system of internal accounting controls. Whereas, the Bribery Act 2010 obliges commercial organizations to prevent bribery of all associated persons and in order to do so, the companies must implement adequate procedures that consist of inter alia risk assessment, devising, implementing and monitoring of policies, and conducting due diligence mechanism.

Last but not least, the differences include the **enforcement and the penalties.** **The UK legislation covers only criminal proceedings that may result in** imprisonment up to ten years and potentially unlimited fines. While the US act allows for both criminal and civil proceedings that may lead to imprisonment up to twenty years and limited fines (up to USD 5 million)³⁹.

The Bribery Act 2010 enacted by the UK imposes stringent obligations on the commercial organizations in order to combat bribery at a global level as it is applicable also to non-UK entities. Prior to this act, international anti-corruption enforcement has been largely dominated by the US Foreign Corrupt Practices Act 1977. Although their stated goals are similar, the rules of the FCPA 1977 and the Bribery Act 2010 are different in some crucial respects. The UK legislation is more rigorous as it prohibits both active and passive, public and commercial bribery. Furthermore, the Bribery Act 2010 defines the offence of failing to prevent bribery that can be executed from both UK and non-UK-based entities, and entirely prohibits facilitation payments. Although this act may have been a cause of controversy, its rules must be followed by all companies that make business with any UK entities.

³⁸ As defined in the Section 12 of the Bribery Act 2010.

³⁹ More about differences: <http://www.lbfpartners.com/en/yayin/the-differences-between-us-foreign-corrupt-practices-act-and-uk-bribery-act.html>; <http://www.nortonrosefulbright.com/knowledge/publications/52195/differences-between-the-uk-bribery-act-and-the-us-foreign-corrupt-practices-act>.

Bribery Act 2010 – brytyjska ustawa antykorupcyjna z perspektywy podmiotów spoza Wielkiej Brytanii

Streszczenie

Bribery Act 2010 (ustawa antykorupcyjna) wprowadzona przez Wielką Brytanię nakłada rygorystyczne obowiązki na organizacje biznesowe. Ustawa ta przeciwdziała korupcji na całym świecie, ponieważ jej regulacje znajdują zastosowanie również do organizacji spoza Wielkiej Brytanii. Ustawa brytyjska to najbardziej rygorystyczna ustawa antykorupcyjna kiedykolwiek uchwalona, ponieważ zakazuje łapówkarstwa aktywnego i pasywnego oraz publicznego i prywatnego. Co więcej, Antibribery Act 2010 definiuje przestępstwo niedopełnienia obowiązku zapobiegania korupcji i w całości (bez żadnych wyjątków) zakazuje przekazywania drobnych upominków (łapówek), które mają przyspieszyć załatwienie jakiejś sprawy (*facilitation payments*).

Słowa kluczowe: korupcja, brytyjska ustawa antykorupcyjna z 2010 r., amerykańska ustawa antykorupcyjna z 1997 r.

Keywords: bribery/corruption, Bribery Act 2010 (the UK), Foreign Corrupt Practices Act 1977 (the US)