

ANTI-CORRUPTION REGULATION

United Kingdom



Anti-Corruption Regulation

Consulting editors

James G Tillen, Leah Moushey

Miller & Chevalier Chartered

Quick reference guide enabling side-by-side comparison of local insights, including into relevant domestic and international law, agencies, enforcement and sanctions; recent landmark investigations and decisions; and other recent trends.

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Correct on

Contributors

United Kingdom



Aneka Randhawa
anneka.randhawa@whitecase.com
White & Case LLP

WHITE & CASE



Jonah Anderson
jonah.anderson@whitecase.com
White & Case LLP

RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United Kingdom is a signatory to the following conventions:

- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union;
- the Council of Europe Criminal Law Convention on Corruption. (Implementation of this convention is monitored by the Group of States against Corruption);
- the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption;
- the United Nations Convention against Corruption;
- the Convention on the Protection of the European Communities Financial Interests and Protocols;
- the Council of Europe Civil Law Convention on Corruption (not yet ratified); and
- the United Nations Convention against Transnational Organized Crime (UNTOC).

The conventions above establish legally binding standards to criminalise bribery of foreign public officials and officials of public international organisations.

The Mechanism for the Review of the Implementation of the UNTOC was launched in October 2020, after 10 years of negotiation. The Review Mechanism is a peer review process designed to assist states to implement the UNTOC. Each state will be reviewed by two peers, selected by the drawing of lots at the beginning of each year of the review cycle. The process will be overseen by the Implementation Review Group, an inter-governmental group of states parties.

The UK also signed the Agreement for the Establishment of the International Anti-Corruption Academy on 2 September 2010. This agreement has not yet been ratified.

The UK has left the European Union (EU) and the transition period ended on 31 December 2020. The question of whether, in the absence of specific provision in UK law, the UK is bound by its international obligations depends on the nature of the convention, and is itself the subject of conflicting views. Where the convention in question is one to which the UK is a party, not in its own right, but as an EU member state, it is likely that the agreement will no longer apply.

In May 2021 the UK and EU Trade and Cooperation Agreement came into force. This agreement sets out 'preferential arrangements' in many key areas such as trade, law enforcement and judicial cooperation in criminal matters.

Law stated - 07 December 2021

Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Bribery Act 2010

The Bribery Act 2010, which came into force on 1 July 2011, is the main legislation governing bribery and corruption offences. The Bribery Act 2010 applies to conduct occurring on or after 1 July 2011 and contains four principal bribery

offences:

- bribing another person (section 1);
- offences related to being bribed (section 2);
- bribery of foreign public officials (section 6); and
- failure of commercial organisations to prevent bribery (section 7).

The failure to prevent offence, under section 7, introduced a strict liability offence for commercial organisations that fail to prevent bribery.

The Bribery Act 2010 is considered an example to other countries of what is needed to deter bribery (www.publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf). By virtue of section 12, the Bribery Act 2010 has extraterritorial reach. Under sections 1, 2 and 6, the UK courts have jurisdiction over offences where no part of the conduct takes place in the UK, but would form part of an offence if it occurred in the UK and that person has a 'close connection' with the UK. Those with a 'close connection' with the UK include:

- British citizens and British overseas nationals and citizens;
- an individual ordinarily resident in the UK; and
- a body incorporated in the UK.

The failure to prevent bribery offence in section 7 applies to UK commercial organisations and to any commercial organisation that carries on a business, or part of a business, in the UK. The commercial organisation is liable for the conduct of an 'associated person', defined in section 8, which includes a person who performs services for or on behalf of an organisation, in any capacity. An offence is committed irrespective of where the conduct constituting the offence takes place. The 'close connection' test does not apply to the section 7 offence.

Section 9 of the Bribery Act 2010 requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them committing bribery. Such guidance was published in March 2011 and remains unrevised and unamended (Bribery Act Guidance).

The old law

The Bribery Act 2010 applies only to conduct that occurred on or after 1 July 2011. Conduct that occurred before that date is subject to the 'old law'. The key offences under the old law are:

- the common law offences of public sector bribery:
 - receipt or offer of an undue reward by or to a person in public office; and
 - misconduct in a public office;
- bribery (active or passive) under the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) and the Prevention of Corruption Act 1916 (the 1916 Act); and
- corrupt transactions with agents under section 1(1) of the Prevention of Corruption Act 1906 (the 1906 Act) and the 1916 Act. This offence applies to all agents in the public or private sector. (The 1906 Act is most commonly used when prosecuting conduct occurring before 1 July 2011.)

The 1889, 1906 and 1916 Acts, together, will be referred to as the 'old law'.

The statutory offences under the old law require the accused to have acted 'corruptly'. It is generally accepted that

dishonesty is not an element of the offences. 'Corruptly' has been held to mean 'not dishonestly, but purposely doing an act which the law forbids as tending to corrupt'. (See *Cooper v Slade* (1857) 10 ER 1488.)

The jurisdictional reach of the old law was clarified by section 109 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act). This made clear that the UK had jurisdiction where the conduct of a UK citizen or corporate took place outside the UK, but such conduct would, if carried out in the UK, constitute any common law offence of bribery or a statutory offence under the old law.

The Bribery Act 2010 repealed the old law. To date, most prosecutions continue to occur under the old law, although this is inevitably likely to change over time.

The offence of conspiracy to commit bribery, contrary to section 1(1) of the Criminal Law Act 1977, may also be used to prosecute offences of bribery.

Law stated - 07 December 2021

Successor liability

Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

The legislation and official guidance does not draw any distinction between an entity and any successor that acquired it after the alleged misconduct. In practice, however, successor liability would require proof that, in relation to the offence, the successor had a directing mind and will (for offences under the old law) or that the successor failed to prevent the offence (for conduct occurring under the Bribery Act 2010). Establishing the directing mind and will of a company requires the identification of an individual within that company, whose conduct and state of mind can be attributed to the company. Where the successor acquires or merges with a company that it has had no previous involvement with, proving a directing mind and will, or a failure to prevent, would be almost impossible.

Under paragraph 2.8.2(v) of the Deferred Prosecution Agreements Code of Practice, the fact that, after the act, an entity has been taken over by another commercial organisation or has had its corporate structure and management changed, are factors in favour of being offered a deferred prosecution agreement (DPA). In addition, guidance issued by the Serious Fraud Office (SFO) in October 2020 identifies as a public interest factor against prosecution, the fact that '(t)he offending is not recent and the Company in its current form is effectively a different entity from that which committed the offences.' The examples given include where the company has been taken over by another organisation, and where the company's management team may have completely changed.

Each case is considered on its own facts and companies should, and are expected to, undertake sufficient due diligence to detect such conduct.

The rest of this chapter will focus on the current bribery law – the Bribery Act 2010 – only.

Law stated - 07 December 2021

Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?

According to the Joint Prosecution Guidance on the Bribery Act 2010, issued on 30 March 2011, the SFO is the primary agency in England and Wales for investigating and prosecuting cases of overseas corruption. The Crown Prosecution Service (CPS) also prosecutes bribery offences investigated by the police, committed either overseas or in England and Wales.

Proceedings for offences under the Bribery Act 2010 may not be instituted without the consent of the Director of the SFO or the Director of Public Prosecutions (DPP) (the head of the CPS). The decision to consent is made in accordance with the Code for Crown Prosecutors (applying the two-stage test of whether: (1) there is sufficient evidence to provide a realistic prospect of conviction; and (2) a prosecution is in the public interest), and also by taking into account the Joint Prosecution Guidance on the Bribery Act 2010, together with the Joint Guidance on Corporate Prosecutions, where relevant.

Joint principles published in 2018 by the SFO, CPS and National Crime Agency (NCA), set out a framework to compensate victims of economic crimes overseas. The principles aim to ensure that overseas victims of bribery, corruption and economic crime, are able to benefit from asset recovery proceedings and compensation orders made in England and Wales.

Law stated - 07 December 2021

Out-of-court disposal and leniency

Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

There are several means by which it is possible to resolve a criminal investigation or other enforcement action and avoid a trial.

Civil recovery orders

A civil recovery order (CRO) is an order obtained in the High Court for the recovery of property that is (or represents) property obtained through unlawful conduct. Whether property was obtained through unlawful conduct is determined to the civil standard, namely on a balance of probabilities. A CRO targets property, rather than an individual, and can be made against any person thought to hold the property.

Deferred prosecution agreements

Deferred prosecution agreements (DPAs) were introduced into English law by the Crime and Courts Act 2013 (CCA 2013), on 24 February 2014. However, a DPA is available in relation to conduct which pre-dates the CCA 2013 coming into force. DPAs are not available in Scotland and Northern Ireland.

A DPA is a voluntary agreement between a prosecutor and a body corporate, a partnership or an unincorporated association, under which a criminal prosecution is deferred, subject to the defendant complying with the terms of the agreement.

The DPA is for a fixed period and is available in relation to offences set out in Part 2 to Schedule 17 of the CCA 2013. These include offences under the Bribery Act 2010, money laundering offences, and other financial crimes. A DPA is not available to individuals.

The decision to enter into negotiations for a DPA is at the discretion of the prosecutor. The DPA Code of Practice (the DPA Code), issued under the CCA 2013, is a Joint Code published by the Director of the SFO and the DPP, which sets out the prosecutors' approach to the use of DPAs. On 23 October 2020, the SFO published a chapter from its handbook that offers guidance on how it approaches DPAs (DPA Guidance). Under the DPA Code and the DPA Guidance, the prosecutor will apply a two-stage test, comprising the evidential stage and the public interest stage. The evidential

stage requires there to be sufficient evidence to provide a realistic prospect of conviction. Under the public interest stage, the prosecutor must be satisfied that the public interest would properly be met by entering into a DPA with the company instead of proceeding to prosecution. The public interest stage requires a balancing of the factors for and against a prosecution. Each case is dealt with on its own facts.

In addition to public interest factors in the DPA Code, the DPA Guidance also lists relevant public interest factors in favour of prosecuting. These include:

- a history of similar conduct or prior regulatory or criminal enforcement action;
- the conduct alleged is part of the established business practices of the company;
- the offence was committed at a time when the company had no or an ineffective corporate compliance programme and it has not been able to demonstrate a significant improvement in the programme since then;
- the company had previously received a warning, sanctions or criminal charges, but had failed to take adequate action to prevent future unlawful conduct;
- failure to notify the wrongdoing within a reasonable time of the offending coming to light;
- reporting the wrongdoing but failing to verify it, or reporting it, knowing or believing it to be inaccurate, misleading or incomplete; and
- significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments.

Additional public interest factors against prosecution, identified in the DPA Guidance, include:

- cooperation;
- a lack of history of similar conduct;
- the existence of a proactive corporate compliance programme, at the time of the offending and at the time of reporting;
- the offending represents isolated actions by individuals, for example, a rogue director;
- the offending is not recent and the company in its current form is effectively a different entity from that which committed the offences;
- a conviction is likely to have disproportionate consequences for the company; and
- a conviction is likely to have collateral effects on the public, the company's employees and shareholders or the company or institutional pension holders.

In August 2019, the SFO published guidance on how it assesses corporate cooperation in an investigation (the Co-operation Guidance). The Co-operation Guidance emphasises the significance of cooperation to the decision of whether a DPA is appropriate. Through its Co-operation Guidance, the SFO has expressed a willingness to challenge claims of legal professional privilege, which prevent certain material, such as witness accounts, from disclosure and, therefore, affects the SFO's ability to evaluate the level of cooperation given. The decision of a company to self-report is an important one and may depend on a risk-benefit analysis. The Co-operation Guidance makes clear that, even where a company has self-reported or cooperated, it is not a guarantee of a particular disposal, such as a DPA. Companies considering self-reporting should seek legal advice on the potential consequences, as well as the process.

In January 2020, the SFO published guidance on how it evaluates a compliance programme and the relevance of its assessment. The SFO will consider a compliance programme at the time of the offending, in its current state, and how it might change going forward. These considerations feed into the SFO's decision on whether to invite a company to enter into DPA negotiations.

Once negotiations for a DPA have begun, under the CCA 2013, the prosecutor must apply to the Crown Court for a

declaration that the DPA is likely to be in the interests of justice and the terms of the DPA are fair, reasonable and proportionate. The terms of a DPA are the result of negotiation between the parties to the agreement. However, once agreed, the proposed DPA must be brought before the Crown Court for judicial approval. Once the DPA is approved, the judge must make the declaration in open court and give reasons for the approval. The terms of a DPA may include the payment of a penalty, payment of costs, the disgorgement of profits and the implementation of training and compliance programmes and monitoring.

The DPA process requires the prosecution to prefer an indictment, charging the corporate with the alleged offences. The proceedings are automatically suspended where a DPA has been approved. A DPA must contain a statement of facts, relating to the alleged offences, and such statement may include admissions made by the corporate.

The financial penalty under a DPA is likely to be broadly comparable to a fine the court would have imposed following a guilty plea. This enables the parties and the Court to have regard to sentencing guidelines. Organisations entering into a DPA can expect a reduction of one-third of the penalty or, as has occurred in the DPAs with Sarclad Ltd and Rolls-Royce, a greater reduction in penalty, to reflect the companies' exceptional cooperation with the SFO investigation.

Individuals

DPAs are not available to individuals. A common term of a DPA is that the company must cooperate with the SFO in its continued investigation into the offending. The cooperation is expected to provide the SFO with material and assistance above and beyond what the law requires, with the objective of prosecuting individuals. Unfortunately, in every case where a DPA has been agreed, the SFO has failed to successfully prosecute any individuals for offences arising out of the conduct forming the subject matter of the DPA. This has highlighted the potential unfairness of DPAs. The process of negotiating a DPA invariably involves the identification of individuals, usually former senior executives, in the formal DPA documents. These individuals may subsequently be acquitted of any criminal conduct. Notwithstanding an acquittal, the DPA process may permit the publication of the DPA, the statement of facts and the final judgment, in which the acquitted individuals are identified as having engaged in criminal conduct. This occurred in the Sarclad, Tesco and Güralp Systems DPAs. The acquitted individuals have no recourse for correcting or expunging their names from the DPA. At the end of 2020 the SFO published a chapter on DPAs forming part of its Operational Handbook. This guidance states that the SFO must give consideration to 'the necessity for and impact of the identities of third parties being published' (including data protection and human rights considerations). It also states that anonymisation of third parties may be appropriate prior to publication.

Law stated - 07 December 2021

FOREIGN BRIBERY

Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

It is an offence under section 6 of the Bribery Act 2010 to bribe a foreign public official with the intention to influence that official in his or her capacity as a foreign public official. 'Influence' in this capacity means influencing him or her in the performance of his functions as a foreign public official. Corrupt intent is not required. However, there must be an intention to obtain or retain a business or other advantage in the conduct of business (section 6(2)). The requirement to prove an intention to obtain and retain business can present some difficulty, particularly in light of the Bribery Act Guidance, which recognises that, in seeking tenders for publicly funded contracts, governments often permit or require those tendering to offer some kind of additional investment in the local economy. Where this is set out in 'written law', the 'additional investment' falls outside the scope of the section 6 offence (paragraph 25 of the Bribery Act Guidance).

A bribe has taken place if and only if:

- the defendant directly, or through a third party, offers, promises or gives any financial or other advantage to the public official or to another person at the official's request or acquiescence;
- the advantage is given or promised with the intention of influencing the person to obtain or retain business or an advantage in the conduct of business; and
- the public official is not permitted or required by the written law applicable to him or her to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

An offence under section 6 is committed if any part of the conduct, forming part of the offence, takes place in the UK or where no part of the conduct takes place in the UK, but would form part of an offence under section 6 if it occurred in the UK and the offender has a close connection with the UK. Those with a 'close connection' with the UK include:

- British citizens and British overseas nationals and citizens;
- an individual ordinarily resident in the UK; and
- a body incorporated in the UK.

The section 6 offence of bribing a foreign public official does not encompass the receipt of a bribe. It is only concerned with the offer, promise or giving of a financial or other advantage. The offence of being bribed is to be found in section 2 of the Bribery Act 2010.

In addition, under section 7, a company may face prosecution in the UK for failing to prevent bribery of a public official, regardless of whether the conduct forming the offence, or part of the offence, takes place in the UK or elsewhere. Under section 7, the sole jurisdictional requirement is that the accused company is incorporated in the UK or carries on part of its business in the UK.

The offence of bribing another person in section 1 of the Bribery Act 2010, and the offence of receiving a bribe under section 2 of the Bribery Act 2010, applies to both the public and private sector and may be used where, for example, it is unclear whether the person being bribed is a public official. It is worth noting that there are differences between sections 1 and 2, and section 6. The Bribery Act Guidance highlights that unlike section 6, section 1 (and by analogy, section 2) requires proof of an intention for the advantage to induce the improper performance of a function or as a reward for the improper performance of such function. The offence under section 6 requires an intention to influence the public official to obtain or retain business or an advantage in the conduct of business.

Law stated - 07 December 2021

Definition of a foreign public official

How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

Under section 6(5) of the Bribery Act 2010, a 'foreign public official' is a person who, outside of the UK, holds a legislative, administrative or judicial position (whether appointed or elected), exercises a public function, or is an official or agent of a public international organisation.

A 'public international organisation' is defined in section 6(6) as an organisation whose members are:

- countries or territories;
- governments of countries or territories;
- other public international organisations; and

- a mixture of any of the above.

Law stated - 07 December 2021

Gifts, travel and entertainment

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There is no legislation specifically dealing with gifts, travel expenses, meals or entertainment. The Bribery Act: Joint Prosecution Guidance of the Director of the Serious Fraud Office (SFO) and the DPP (the Joint Guidance), published on 30 March 2011, recognises that hospitality and promotional expenditure that is reasonable, proportionate and made in good faith is an established and important part of doing business and the Bribery Act 2010 does not seek to penalise this activity. However, hospitality and promotional expenditure may amount to an offence under the Bribery Act 2010, provided the elements of the relevant offence are satisfied.

Law stated - 07 December 2021

Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

Facilitation or 'grease' payments would fall foul of section 6 of the Bribery Act 2010, as well as the old law. English law, including the Bribery Act 2010, draws no distinction between a bribe and a facilitation payment.

Law stated - 07 December 2021

Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

It is irrelevant, in respect of an offence of bribery under section 1 of the Bribery Act 2010, whether the bribe was offered, promised or given by the defendant directly or through a third party. Similarly, in respect of an offence under section 6 (bribery of foreign public officials), the circumstances in which an offence is committed include where the bribe is offered, promised or given directly by the defendant or through a third party, and where the bribe is offered, promised or given to another person at the request of the foreign public official or with his or her acquiescence.

A corporate body may be held criminally liable for bribery committed by an 'associated person' (which could include an intermediary or a third party) through the offence of failure to prevent bribery under section 7 of the Bribery Act 2010.

Law stated - 07 December 2021

Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Individuals can be held liable for bribery of a foreign public official under sections 1, 2 and 6 of the Bribery Act 2010.

Under section 14 of the Bribery Act 2010, bribery offences under section 1, 2 and 6 of the Bribery Act 2010 may be

committed by a body corporate, where the offence is proved to have been committed with the consent or connivance of a senior officer of the body corporate or a person purporting to act in such capacity. In these circumstances, both the senior officer, as well as the body corporate, is guilty of the offence, unless the senior officer does not have a close connection with the UK. 'Close connection' with the UK is defined in section 12(4) of the Bribery Act 2010.

In addition, under section 7 of the Bribery Act 2010, a commercial organisation can be held strictly liable for failure to prevent bribery. The offence is committed by a relevant commercial organisation where an 'associated person' bribes another person, intending to obtain or retain business for the commercial organisation, or intending to obtain or retain an advantage in the conduct of business for the organisation. The bribery must constitute an offence under sections 1 or 6 of the Bribery Act 2010.

An 'associated person' is defined in section 8 of the Bribery Act 2010 as a person who performs services for on behalf of the commercial organisation and includes employees, agents and subsidiaries. Where the person is an employee, there is a rebuttable presumption that he or she is an associated person.

The only defence available for the commercial organisation is to prove that it had in place 'adequate procedures' designed to prevent bribery.

Law stated - 07 December 2021

Private commercial bribery

To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

The offences under section 1, 2 and 14 of the Bribery Act 2010 apply to private and public sector bribery. Similarly, the section 7, failure to prevent bribery, offence also applies to bribery by associated persons in the private sector.

Law stated - 07 December 2021

Defences

What defences and exemptions are available to those accused of foreign bribery violations?

There are limited defences available to those accused of foreign bribery offences. The Bribery Act Guidance recognises that there may be circumstances in which an individual is left with no alternative but to make payments to protect against loss of life, limb or liberty. In those circumstances, the common law defence of duress is likely to be available.

Section 6 offence (bribery of foreign public officials)

Under section 6(3)(b) of the Bribery Act 2010, for the offence to be complete, the foreign public official must be neither permitted nor required by the written law applicable to him to be influenced in his capacity as a public official by the offer, promise or gift. A mistaken belief that the public official was so permitted or required is not a defence.

Section 7 commercial organisational offence (failure to prevent bribery)

It is a defence for the commercial organisation to prove that it had in place adequate procedures, designed to prevent such conduct by associated persons. It is for the organisation to establish, on a balance of probabilities, that it had adequate procedures in place.

The Bribery Act Guidance sets out six key principles for commercial organisations wishing to prevent bribery being committed on their behalf by associated persons:

1. Proportionate procedures. The procedures should be proportionate to the risk faced and to the nature, scale and complexity of the commercial organisation's activities. Procedures must be clear, practical, accessible, effectively implemented and enforced.
2. Top-level commitment. The top-level management must be committed to preventing bribery by persons associated with the organisation and should foster a culture within the organisation in which bribery is never acceptable.
3. Risk assessment. This involves an assessment of the nature and extent of the exposure to potential external and internal risks of bribery on the organisation's behalf. The assessment should be periodic, informed and documented.
4. Due diligence. The application of due diligence procedures, taking a proportionate and risk-based approach, in respect of associated persons in order to mitigate identified bribery risks.
5. Communication (including training). This involves seeking to ensure that the bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks faced.
6. Monitoring and review. The risks and procedures should be regularly monitored and reviewed, and improvements made where necessary.

Section 13 of the Bribery Act 2010 provides a defence to an offence under section 1 and 2 of the Bribery Act 2010, where the defendant proves his or her conduct was necessary for the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged on active service. The defence does not apply to an offence under section 6 of the Bribery Act 2010.

Law stated - 07 December 2021

Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The SFO's remit is to investigate and prosecute serious or complex fraud, including domestic or overseas bribery or corruption:

- that undermines UK plc commercial or public interests;
- where the actual or potential financial loss is high;
- where the potential economic harm is significant; and
- where there is a significant public interest.

The CPS may also prosecute offences involving bribery and corruption, but the SFO is the primary agency engaged in such prosecutions.

The NCA leads UK law enforcement's response to bribery, corruption and sanctions evasion. It provides intelligence support and specialist operational capability. The work of the NCA extends to corruption overseas and it engages with foreign law enforcement agencies. The International Corruption Unit (ICU) within the NCA investigates international bribery, corruption and related money-laundering offences. The ICU traces and recovers the proceeds of international corruption. Its key role is to investigate:

- money laundering in the UK resulting from corruption of high-ranking officials overseas;
- bribery involving UK-based companies or nationals that has an international element; and

- cross-border bribery where there is a link to the UK.

The Financial Conduct Authority (FCA) is a regulatory body responsible for regulating financial services firms and financial markets in the UK, and the prudential supervisor. Although it does not prosecute matters under the Bribery Act 2010, any conduct by a regulated firm relating to bribery or corruption risks may also constitute a breach of the rules or principles of the FCA Handbook. Under Principle 11 of the FCA Handbook, a firm must deal with its regulator in an open and cooperative way, and must disclose to the appropriate regulator anything relating to the firm, of which that regulator would reasonably expect notice. Accordingly, a regulated firm may be required under Principle 11 to report conduct involving bribery or corruption to the regulator.

Law stated - 07 December 2021

Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

In recent years, one of the most noteworthy shifts in the patterns of enforcement is the use of DPAs to resolve a criminal investigation into a body corporate. From the point of view of the SFO, a DPA can result in very large penalties and the recovery of prosecution costs. A DPA also avoids the uncertainty of a criminal trial, which is costly and risky for both the SFO and the corporate defendant.

For the SFO, DPAs are a success. However, the continued investigations into individuals who may have been involved in unlawful conduct forming the basis of a DPA, have not yet resulted in any convictions. Nevertheless, there is every indication that the SFO intends to continue, and increase, its use of DPAs.

The increased cooperation between prosecutors in different jurisdictions has been clear. This is likely to expand further as more jurisdictions introduce DPAs in some form. The recent Airbus DPA is a good example of this. It resulted in a global settlement in which the company entered into DPAs in the USA and the UK, and a CJIP in France. The prosecutors in each jurisdiction coordinated and agreed which jurisdictions each would investigate.

The Criminal Finances Act 2017 (the CFA), which was designed 'to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime or corruption', came into force on 27 April 2017. The CFA introduced unexplained wealth orders (UWOs), which have been available to law enforcement since 31 January 2018. A UWO is an investigative tool, requiring a person holding certain property to provide relevant information, including details of his or her interest in the property, and how he or she acquired, and paid for it. A UWO can be made in respect of any property, located anywhere in the world, that is held by a politically exposed person (PEP) from outside the European Economic Area, or a person reasonably suspected of past or present involvement in serious crime or of being connected to such a person. There is no requirement for suspicion in relation to criminality regarding a PEP. The property in question must have a value of at least £50,000. Failure to comply with a UWO results in a presumption that the property in question is recoverable, as it was obtained through unlawful conduct.

Law stated - 07 December 2021

Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under the Bribery Act 2010, a foreign company which carries on a business or part of a business in any part of the UK is a 'relevant organisation' for the purpose of section 7 of the Bribery Act 2010. As such, a foreign company may be prosecuted for the section 7 offence of failure to prevent bribery even where none of the associated person's relevant

conduct occurs in the UK (section 7(5)(b) and (d), and section 12(5) of the Bribery Act 2010).

Law stated - 07 December 2021

Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Offences under section 1, 2 and 6 of the Bribery Act 2010 carry a maximum penalty of 10 years imprisonment for an individual. The individual may also be required to pay a financial penalty. In relation to a body corporate, the court may impose an unlimited fine. The fine imposed is based on:

- an assessment of the gross profit from the advantage obtained, retained or sought as a result of the bribery offence ('the harm'); and
- multiplying the harm figure by reference to a determined level of culpability.

Conviction of an offence under the Bribery Act 2010 may also be subject to confiscation or a civil recovery order under Proceeds of Crime Act 2002. Non-payment of any confiscation can result in a custodial sentence.

The financial penalty under a DPA is likely to be broadly comparable to a fine the court would have imposed following a guilty plea.

A conviction for an offence under section 1, 2 or 6 of the Bribery Act 2010 will result in the mandatory debarment for up to five years. The debarment prevents a company from entering into public contracts as a provider, supplier or contractor.

The EU's 2014 Public Procurement Directive amended the regulations, and clarified that an offence under section 7 does not trigger mandatory debarment. However, a conviction under section 7 offence could attract discretionary debarment of three years, which could have a significant impact on a company.

Law stated - 07 December 2021

Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

DPAs

There have been 12 DPAs since their introduction in 2014. Of these, nine have involved offences involving bribery and corruption. DPAs of particular note are:

- Rolls-Royce plc – in January 2017, Rolls-Royce entered into a DPA in relation to two counts of failure to prevent bribery (section 7 offence). It paid a fine of £497 million. Rolls-Royce achieved this DPA without self-reporting, although the court found that Rolls Royce's level of cooperation with the SFO was tantamount to self-reporting. To date, no individuals have been charged with any offences arising out of the conduct forming the subject matter of the DPA.
- Airbus SE – in January 2020, Airbus entered into a three-year DPA with the SFO, as part of a global settlement involving the Parquet National Financier in France and the US Department of Justice. The total penalty imposed was €3.6 billion. This was the largest penalty imposed under a DPA. The DPA agreed with the SFO involved the payment of a fine of €398,034,571, disgorgement of profits of €585,939,740 and the payment of costs in the sum of €6.9 million. The sums paid by Airbus, under its DPA with the SFO, exceeds the total sum paid in all preceding

DPA. The SFO has not yet announced any charges against individuals arising out of the conduct forming the subject matter of the DPA.

Privilege

The SFO has made clear that it is willing to challenge cases where it disputes a claim of legal professional privilege (LPP), particularly in the context of an internal investigation. This has been subject to litigation in the case of *SFO v Eurasian Natural Resources Corporation Ltd (ENRC)* [2018] EWCA Civ 2006. The SFO issued ENRC with a compulsory notice requiring the production of a number of documents, including notes of interviews conducted with ENRC employees as part of an internal investigation and presentations to the board and governance committee about the findings of ENRC's investigation. ENRC claimed that the material sought was subject to LPP. At first instance, in the High Court, the SFO argued successfully that the material was not privileged. However, on appeal, the Court of Appeal held that litigation privilege applied from the point at which ENRC engaged lawyers to conduct an internal investigation, which was some time before the SFO opened its investigation. On the evidence, comments made by the SFO, and its interactions with ENRC, made it clear that criminal proceedings were possible, if not likely, unless the matter was settled, and therefore were within reasonable contemplation. The court stated that it is:

Obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation.

The SFO's Corporate Co-operation Guidance, published in August 2019, reiterates the SFO's willingness to challenge an assertion of LPP, particularly in relation to first accounts, internal investigations, interviews or other documents.

Section 2 notices – extraterritoriality

Under section 2(3) of the Criminal Justice Act 1987, the Director of the SFO has the power to compel any individual or entity to provide information or documentation, which is believed to be relevant to a matter under investigation. Whether this power extends to material held outside the United Kingdom was raised in a recent case, *KBR v SFO* [2018] EWHC 2010 (Admin). In that case, a section 2 notice was issued to KBR Inc, the parent company of the UK subsidiary under investigation (KBR Ltd), to provide documents held outside of England and Wales, but which the SFO felt were potentially relevant to their investigation of KBR Ltd.

The High Court confirmed that section 2 notices must have an element of extraterritorial application, stating that it was 'scarcely credible that a UK company could resist an otherwise lawful s.2(3) notice on the ground that the documents in question were held on a server out of the jurisdiction'. UK companies are therefore required, upon receipt of a section 2 notice, to furnish the SFO with relevant material that they hold both domestically and overseas, unless they have a reasonable excuse for failing to comply.

As for whether KBR Inc (as a foreign parent company) was obliged to provide the SFO with documents held overseas, the High Court held that there was a clear public interest in the extraterritorial ambit of section 2(3). It held that section 2(3) should extend to foreign companies in respect of documents held outside the jurisdiction, 'when there is a sufficient connection between the company and jurisdiction'; language that does not appear in the legislation.

The mere fact that KBR Inc was the parent of KBR Ltd did not amount to a 'sufficient connection', nor was the fact that KBR Inc had cooperated to a degree with the SFO's request for documents. However, among other things, the SFO's investigation had revealed a purported link between KBR Inc and the method of making the alleged corrupt payments,

and the High Court held that this was a 'sufficient connection'. The Supreme Court handed down its judgment in February 2021, overturning the High Court's decision. It held that it was not Parliament's intention for the Criminal Justice Act 1987 to give the SFO the power to compel a non-UK company (with no registered UK address) to produce documents held in the US. Other tools such as mutual legal assistance were available to assist with such a request and to facilitate international investigations. The Supreme Court held that implying a 'sufficient connection' test into the legislation (in order to require a non-UK company to produce documents outside the UK) would be inconsistent with the intention of Parliament and 'involve illegitimately rewriting the statute'. At its core the Supreme Court's judgment reflects the fact that UK legislation is generally not intended to have extra-territorial effect.

Law stated - 07 December 2021

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The financial reporting and accounting rules applicable to private and limited companies in the UK are set out in the Companies Act 2006. Since April 2016, UK companies have been required to publish a central and publicly accessible register of beneficial ownership (known as 'persons with significant control'). The Companies Act also contains provisions requiring certain overseas companies, with a presence in the UK, to file copies of accounting documents disclosed under the law of the parent.

The People with Significant Control (PSC) register requires UK companies (except listed companies) and limited liability partnerships (LLPs) to declare information about the individuals who own or control them, including their name, month and year of birth, nationality, and details of their interest in the company. A PSC is someone who holds more than 25 per cent of shares or voting rights in a company and has the right to appoint or remove the majority of the board of directors or otherwise exercises significant influence or control.

Regulated business are under an obligation to keep certain documents for a period of five years from the date on which a business knows or has reasonable grounds to believe that a transaction is complete or a business relationship has come to an end. Once the period has expired, all personal data obtained for the purpose of the regulations must be deleted, except in certain limited circumstances.

Law stated - 07 December 2021

Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no general legal requirement for a company to disclose conduct violating anti-bribery laws. However, since the introduction of deferred prosecution agreements (DPAs), the emphasis on self-reporting has grown and self-reporting is taken into account when considering whether a company should be invited to enter DPA negotiations. In addition, there are a number of reporting requirements in relation to money laundering under the Proceeds of Crime Act 2002, which may be engaged by an underlying bribery offence.

Law stated - 07 December 2021

Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Laws in relation to record-keeping are not, in themselves, used to prosecute domestic or foreign bribery. In general terms, failure to comply with record-keeping requirements amounts to an offence in itself, but it is possible for the failure to be relied on to establish some form of wrongdoing, or even to provide support for allegations of bribery.

Law stated - 07 December 2021

Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Under section 993 of the Companies Act 2006, if any business 'is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence'.

Failure to comply with section 386 of the Companies Act 2006 (relating to the keeping of accounting records) is an offence under section 387 and carries a maximum penalty of two years' imprisonment or a fine, or both.

More generally, the offences of false accounting under section 17(1) of the Theft Act 1968 (the Theft Act), and fraud by false representation or failing to disclose information, under sections 2 and 3 of the Fraud Act 2006 (the Fraud Act), may also be relevant. The offence under the Theft Act carries a maximum penalty of seven years' imprisonment. The Fraud Act offences each carry a maximum penalty of 10 years' imprisonment.

Law stated - 07 December 2021

Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The HMRC Business Income Manual confirms that no deduction is allowed for payments that constitute a criminal offence under the Bribery Act 2010. Where a business has a criminal conviction for bribery, the tax treatment of the bribes will be checked by HMRC.

Law stated - 07 December 2021

DOMESTIC BRIBERY

Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The offence under section 1 of the Bribery Act 2010 can apply to the bribery of a domestic public official.

Law stated - 07 December 2021

Scope of prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. The offence under section 1 of the Bribery Act 2010 applies to the offer, promise or giving of a bribe. The offence under section 2 of the Bribery Act 2010, applies to the receipt of bribes.

Law stated - 07 December 2021

Definition of a domestic public official

How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

Although section 6(5) of the Bribery Act 2010 defines a 'foreign public official', the Bribery Act 2010 does not draw a distinction between bribes paid to a public official and those paid in the private sector. Therefore, the Bribery Act 2010 does not define a 'domestic public official'.

Law stated - 07 December 2021

Gifts, travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

There is no legislation specifically dealing with gifts, travel expenses, meals or entertainment, but they can constitute bribery.

There is no detailed guidance on what gifts or hospitality might constitute a bribe and each case will be considered on its facts.

Law stated - 07 December 2021

Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The decision whether to prosecute in respect of a facilitation payment is governed by the Full Code Test in the Code for Crown Prosecutors. The Full Code Test comprises two stages: the evidential stage and the public interest stage. The evidential stage requires consideration of whether there is sufficient evidence to provide a realistic prospect of conviction. If the evidential stage is not satisfied, the prosecutor does not go on to consider the public interest stage. The public interest stage requires consideration of whether a prosecution is required in the public interest. Where the Full Code Test is satisfied, it is the stated policy of the Serious Fraud Office (SFO) to prosecute but, in appropriate cases, it may use its asset recovery powers under the Proceeds of Crime Act 2002 as an alternative to prosecution. However, there is no presumption in favour of civil settlements (see: www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/).

Law stated - 07 December 2021

Public official participation in commercial activities

What are the restrictions on a domestic public official participating in commercial activities while in office?

There is no general restriction on a domestic public official participating in commercial activities while in office. However, public officials are required to comply with codes of conduct and requirements to declare and register interests to ensure no conflict arises, or appears to arise, between their public duties and private interests.

Law stated - 07 December 2021

Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

It is irrelevant under the Bribery Act 2010 whether the bribe was offered, promised or given by the defendant directly or through a third party.

Law stated - 07 December 2021

Individual and corporate liability

Can both individuals and companies be held liable for violating the domestic bribery rules?

Yes.

Law stated - 07 December 2021

Private commercial bribery

To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

The offences under section 1, 2 and 7 of the Bribery Act 2010 apply to private and public sector bribery.

Law stated - 07 December 2021

Defences

What defences and exemptions are available to those accused of domestic bribery violations?

There are limited defences available to those accused of domestic bribery offences. The Bribery Act Guidance recognises that there may be circumstances in which an individual is left with no alternative but to make payments to protect against loss of life, limb or liberty. In those circumstances, the common law defence of duress is likely to be available.

Law stated - 07 December 2021

Agency enforcement

What government agencies enforce the domestic bribery laws and regulations?

The SFO's remit is to investigate and prosecute serious or complex fraud, including domestic or overseas bribery or corruption:

- that undermines UK plc commercial or public interests;
- where the actual or potential financial loss is high;
- where the potential economic harm is significant; and
- where there is a significant public interest.

The Crown Prosecution Service (CPS) may also prosecute offences involving bribery and corruption, but the SFO is the primary agency engaged in such prosecutions.

The National Crime Agency (NCA) leads UK law enforcement's response to bribery, corruption and sanctions evasion. It provides intelligence support and specialist operational capability.

The Financial Conduct Authority (FCA) is a regulatory body responsible for regulating financial services firms and financial markets in the UK, and the prudential supervisor. Although it does not prosecute matters under the Bribery Act 2010, any conduct by a regulated firm relating to bribery or corruption risks may also constitute a breach of the rules or principles of the FCA Handbook. Under Principle 11 of the FCA Handbook, a firm must deal with its regulator in an open and cooperative way, and must disclose to the appropriate regulator anything relating to the firm, of which that regulator would reasonably expect notice. Accordingly, a regulated firm may be required under Principle 11 to report conduct involving bribery or corruption to the regulator.

Law stated - 07 December 2021

Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

In recent years, one of the most noteworthy shifts in the patterns of enforcement is the use of DPAs to resolve a criminal investigation into a body corporate. This also applies to domestic bribery. However, at least seven of the nine DPAs (in relation to which there is publicly available information), which related to offences involving bribery and corruption, had an international element, and were not strictly domestic bribery cases.

Law stated - 07 December 2021

Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for domestic bribery?

A foreign company that carries on a business or part of a business in any part of the UK is a 'relevant organisation' for the purpose of section 7 of the Bribery Act 2010. As such, a foreign company may be prosecuted for the section 7 offence of failure to prevent bribery both where the bribery took place in the UK and where none of the associated person's relevant conduct occurs in the UK.

Law stated - 07 December 2021

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What are the sanctions for individuals and companies that violate the domestic bribery rules?

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Law stated - 07 December 2021

Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The SFO's Corporate Co-operation Guidance, published in August 2019, reiterates the SFO's willingness to challenge an assertion of LPP, particularly in relation to first accounts, internal investigations, interviews or other documents.

Law stated - 07 December 2021

UPDATE AND TRENDS

Key developments of the past year

Please highlight any recent significant events or trends related to your national anti-corruption laws.

There is every indication that the Serious Fraud Office (SFO) intends to continue, and increase, its use of deferred prosecution agreements (DPAs).

The increased cooperation between prosecutors in different jurisdictions has been clear. This is likely to expand further as more jurisdictions introduce DPAs in some form. Although a further three DPAs were entered into in 2021, the Airbus DPA agreed in 2020 is still the best example of a multi-jurisdictional approach to bribery allegations. It resulted in a

global settlement totaling €3.6 billion with authorities in the US, the UK and France. The prosecutors in each jurisdiction coordinated and agreed which jurisdictions each would investigate.

The SFO's Corporate Co-operation Guidance, published in August 2019, reiterates the SFO's willingness to challenge an assertion of LPP, particularly in relation to first accounts, internal investigations, interviews or other documents.

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

Law stated - 07 December 2021

LAW STATED DATE



Correct on

Give the date on which the information above is accurate.

7 December 2021.

Law stated - 07 December 2021

Jurisdictions

	Australia	Holding Redlich
	China	Herbert Smith Freehills LLP
	France	Bougartchev Moyne Associés AARPI
	Greece	ANAGNOSTOPOULOS
	Hong Kong	Herbert Smith Freehills LLP
	Israel	Herzog Fox & Neeman
	Italy	Studio Legale Pisano
	Japan	Anderson Mori and Tomotsune
	Netherlands	Sjöcrona Van Stigt
	Russia	Noerr PartGmbH
	Singapore	Norton Rose Fulbright
	Sweden	NORDIA LAW
	Switzerland	Schellenberg Wittmer
	Ukraine	GOLAW
	United Kingdom	White & Case LLP
	USA	Miller & Chevalier Chartered