寄稿

The UK Bribery Act in the context of overseas subsidiaries and global governance

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1. Introduction

Enforcement agencies and regulators across the globe are increasingly focused on the culture and conduct of corporations. Bribery and corruption, economic crime and fraud continue to be high on political agendas. Over the past two decades, the number and profile of multi-agency, multi-jurisdictional, regulatory and criminal investigations have risen exponentially. As authorities worldwide adopt a collaborative approach to the (formal and informal) sharing of information, this trend is likely to increase. Further, on the basis that bribery and corruption risks are often elevated in times of crisis, the impact of the Covid-19 pandemic will only act as an accelerant.

In this context, it is important for Japanese companies to be aware of the broad jurisdictional reach and implications of the UK Bribery Act 2010 ("UKBA"), viewed as one of the toughest anti-corruption statutes in place globally, and the steps that need to be taken to ensure effective compliance. It goes beyond even the US Foreign Corrupt Practices Act 1977 (the "FCPA"), on the basis that it applies to commercial bribery (not only bribery of public officials), there is no defence for facilitation payments (unlike the FCPA) and there is no need to prove "corrupt" intention (which is still required under the FCPA).

The UKBA continues to be actively enforced by the UK Serious Fraud Office (the "SFO") which both investigates and prosecutes its cases. And almost all its cases involve multiple jurisdictions – some as many as 20. By way of example, on 31 January 2020, Airbus reached a record-breaking €3.6bn global settlement with UK[1], French and US authorities regarding allegations of bribery and corruption. This is the largest corruption related deferred prosecution agreement ("DPA")[2] anywhere to date involving the SFO. These three resolutions reflect the culmination of a three-and-a-half year UK and French joint investigation and two-year parallel US investigation, together touching 16 jurisdictions and serves as a warning on the far-reaching implications of wrongdoing.

We set out below an overview of the offences under the UKBA and explain how the offences could potentially apply to Japanese companies. We also explore how appropriate governance and controls of overseas subsidiaries are fundamental to ensuring effective compliance.

2. Overview of the UK Bribery Act 2010

The UKBA contains four main bribery offences:

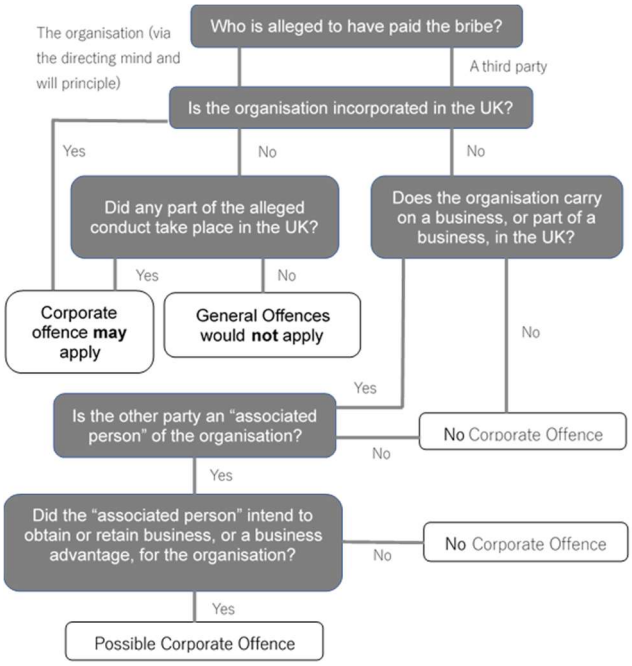
① a general offence of bribing;[3]

② a general offence of being bribed[4] (together, the "General Offences");

③ an offence of bribing a foreign public official[5] ("FPO"); and

④ a corporate offence of failing to prevent bribery by persons associated with relevant commercial organisations[6] (the "Corporate Offence"). A relevant commercial organisation is not limited to UK companies.

A diagram setting out how these offences might be engaged is below. It is also important to note that the UKBA is extraterritorial – depending on the circumstances, a person or company may be liable regardless of where in the world the bribe is paid.



A General Offence is committed when a person (individual or corporate, as to which see paragraph immediately below) either: (i) offers, promises or give another person; or (ii) requests, agrees to receive or accepts, a financial or other advantage in connection with a person performing a function "improperly"[7]. Improper performance of a function is one which breaches an expectation that the function will be performed in good faith, impartially or as a result of a position of trust.

The General Offences apply to both the public and the private sectors. Commercial organisations may be liable for the General Offences (or the offence of bribing an FPO) if the organisation is incorporated in the UK or if any act or omission which formed part of the offence took place in the UK.

There is also a separate offence of bribing an FPO. Unlike the General Offences, there is no need for the FPO to perform his or her function "improperly" as a result of the bribe – all that is required is an intention to influence the FPO in their official capacity. However, no offence will be committed where a written local law requires or permits the FPO to be influenced by the advantage.

Facilitation (or "grease") payments are however illegal under the UKBA, even if they are not prohibited, or even where they are expected, by local custom. As mentioned above, this contrasts with the position in the US, where under the FCPA there is an exception for so-called facilitation payments.[8]

The Corporate Offence

Under the Corporate Offence, a relevant commercial organisation will be liable if:

① a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for the company (that is, commits the general offence of bribing or bribing an FPO), and

② there are no adequate procedures in place designed to prevent bribery.

It is effectively an offence of strict liability (subject to the adequate procedures defence) and reflects the UK government's emphasis on the importance of an ethical corporate culture and the need for the entire organisation to be committed to preventing bribery.

The definition of **"relevant commercial organisation"** is very wide and includes bodies incorporated in the UK or UK partnerships, no matter where they carry on business, and companies and partnerships carrying on business in UK, no matter where they are incorporated.

What constitutes **"carrying on a business"** has not been formally defined, and it is likely that an assessment will be made on the basis of the frequency and importance of the company's dealings in the UK, a company's physical presence in the UK and the location of its central management.

Whether a non-UK company with a UK subsidiary is considered to be carrying on business or part of a business in the UK through its subsidiary will depend on the relationship between the parent and subsidiary and the degree of control exercised by the parent company.

Likewise, **"associated person"** has been defined widely to include people who perform services for or on behalf of the company regardless of their capacity. This is intended to be broad so as to embrace the whole range of persons connected to an organisation that might be capable of committing bribery on the organisation's behalf, so may include, for example, the company's employee, agent or subsidiary or joint venture partner.

It should be noted that it is irrelevant whether the business, or part of a business, which is carried out in the UK has any hand in, or connection to, the bribery. The offence will be applicable wherever an associated person pays bribes with the intention that the non-UK parent company should gain a business or an advantage in the conduct of business, and any part of the non-UK parent company's business is carried on in the UK.

All this goes to say that Japanese companies should carefully consider whether the extent of their operations mean that they may fall within the extra-territorial application of the UKBA. In any case, we note that it is good practice for an organisation to regularly review and monitor its anti-bribery policies and procedures to ensure they are UKBA-compliant in order, if necessary, to be able to avail itself of the defence of having in place "adequate procedures" to prevent bribery.

Adequate procedures

It is a defence to the Corporate Offence that the business had "adequate procedures" in place designed to prevent persons associated with the company from undertaking such conduct. Guidance from the UK Ministry of Justice[9] sets out six principles that should inform a commercial organisation's approach in establishing adequate procedures. The first of these is that a commercial organisation should implement procedures which are proportionate to the bribery risks it faces, and the nature, scale and complexity of its activities. The remaining five principles provide guidance on how these procedures should be tailored to the company's risk profile and implemented throughout the organisation. These include: (i) top level commitment; (ii) risk assessment; (iii) due diligence; (iv) communication (including training); (v) monitoring and review.

Penalties[10]

Penalties for breaching the provisions of the UKBA are severe and include a potentially unlimited fine as well as the possibility of mandatory debarment from public procurement contracts. On the basis of recent enforcement decisions, the scale of the penalties being imposed continues to increase.

3. Implications in relation to the Modern Slavery Act

Companies that "carry on a business" for the purposes of the UKBA should also be aware of their obligations under the UK Modern Slavery Act 2015 (the "MSA"), which requires commercial organisations (wherever incorporated) who: (i) are carrying on a business (or part of a business) in the UK; (ii) supply goods or services; and (iii) have an annual (aggregated)[11] turnover of GBP 36 million or more (equivalent to approximately JPY 5.4 billion), to prepare and publish on their website a board-approved 'modern slavery and human trafficking statement' (a "Statement") for each financial year setting out the steps they are taking to combat modern slavery and human trafficking in their organisation and supply chains.

Similarly to the UKBA, "carrying on a business" is not defined in the MSA, and Government guidance merely states that this should be interpreted "by applying a common sense approach". In practice, organisations that are carrying on a business in the UK for the purposes of the UKBA tend to take the view that they are doing so for the purposes of the MSA as well and vice versa[12].

While the UKBA is enforced by the SFO, the requirement to prepare and publish a Statement has historically been enforced through informal pressure from NGOs, but also increasingly from investors. However, the UK Government has previously written to a number of allegedly non-compliant companies indicating that it plans to publish a non-compliance list; although to date, no such list appears to have been prepared. The UK Government also proposes to make it mandatory for in scope organisations to publish a Statement on a Government-run reporting service[13] (not just on the relevant organisation's website). The UK Government can

compel the publication of a Statement by obtaining an injunction (a failure to comply with which would be punishable by unlimited fine), but in practice this mechanism has never been used.

4. Appropriate governance and controls of overseas subsidiaries

Within the context of increased focus by enforcement agencies and regulators on corporate misconduct, there is rising scrutiny of parent company controls over its overseas subsidiaries. In particular, there are enhanced legislative efforts to hold parent companies responsible for subsidiaries and other associated undertakings (e.g., joint ventures) in relation to operational corruption, human rights, labour, environmental and taxation risks. Additionally, litigation or complaints to regulators have been increasingly used as a tool to push organisations to improve their corporate governance in some cases as part of a broader emphasis on environment, social and governance issues.

For example, the UK Supreme Court recently opened the way for a hearing on environmental and economic damage allegedly caused by an overseas subsidiary of Royal Dutch Shell, on the basis that the London-headquartered parent company controlled and directed the relevant operations of its fully-owned Nigerian subsidiary. The US Supreme Court is also set to rule on a case against food manufacturers relating to the nature of corporate liability for alleged human rights abuses and child slavery in the supply chain.

Also of note is the recent UK Supreme Court ruling[14] which held that the SFO did not have the power to compel a foreign company to produce documents held overseas, pursuant to its investigation powers. The practical effect of this decision is that foreign companies will not find themselves on the receiving end of an order compelling the production of information or documents, should a UK-based group entity be under investigation by the SFO (unless it can be obtained through a mutual legal assistance treaty or other process). This will be a disappointing decision for the SFO, whose efforts to investigate overseas companies in connection with cross-border crime where crucial documentary evidence is held overseas can be frustrated by a mutual legal assistance process unsuited to modern communication methods. However, it does underline the fact that the SFO does consider overseas companies within its purview.

5. Importance of effective compliance

In this context, it has become increasingly important for parent companies to implement a structure of appropriate controls relating to the governance of overseas subsidiaries, and effective compliance through embedding good corporate culture remains key in minimising corporate governance risks. Key features of this will include:

(1) Governance and Oversight: Board and senior management should maintain effective and adequate oversight of the governance and compliance framework in place, as policies and procedures alone are not sufficient and can create risk if not effectively implemented. Cross-functional skills and perspectives are key, and the importance of cultural differences is often underestimated.
(2) Accountability: Companies are increasingly embedding compliance into KPIs and remuneration, which will drive accountability. Subsidiaries should have adequate autonomy, resource and expertise to be able to implement, support and maintain an effective compliance framework.
(3) Transparency: Regular risk assessment is fundamental to effectiveness and adaptability of compliance environment. External reporting has been driving enhanced internal scrutiny, while whistleblowing remains a key mechanism for identifying and managing risk "hot-spots".
(4) Evidence: Often practical implementation of policies and procedures cannot be sufficiently evidenced within the business and therefore companies should ensure that they appropriately evidence decision-making and remedial actions taken.

6. Increased regulatory focus on control of subsidiaries and cross-border enforcement trends

As mentioned above, the Airbus DPA highlights firstly, the increasing willingness of authorities to come to a global resolution; the three settlement agreements (in the UK, France and the US) each acknowledged and gave credit for fines paid across the other two jurisdictions.

Secondly, company transformation through a compliance and culture overhaul now appears to be the norm. Airbus was praised for its remediation efforts to completely transform the company's leadership and compliance framework. In circumstances where Airbus' previous approach to compliance was found to be good on paper but ineffective in practice, with policies and procedures being easily circumvented, the overhaul of its executive committee, board and ethics and compliance framework was necessarily significant.

Please note that the information contained in this article is for general information purposes only and does not claim to be comprehensive or provide legal or other advice.

When might a Japanese company be liable under the UKBA?

A Japanese company could be liable under the General Offences (of bribing or being bribed) or liable for bribing a FPO where the relevant misconduct takes place within the UK.

Example: Company A is a well-known sports clothing company incorporated in Japan. It has yet to break into the UK market. It pays bribes in the UK to a UK agent acting on behalf of a well-known UK retail chain, to help it win a contract to supply a new line in golfing wear to that chain in the UK. Company A may be liable for the general offence of bribing[15].
If a senior officer of Company A (such as a director or manager) consented to or connived in the payment of the bribe, that officer may also be liable for the same offence[16].

A Japanese company could be liable for the Corporate Offence if it carries on business in the UK, even if it is not incorporated in the UK.

Example: Company B is incorporated in Japan and develops land for golf courses. It conducts business in the UK through its local subsidiary (an "associated person"). During the application process to obtain planning permission to enlarge its flagship golf course in a conservation area, the local subsidiary provides lavish gifts and hospitality to a member of the local council's planning review team in an effort to influence the decision. Company B could be liable for the Corporate Offence unless it had adequate procedures in place to prevent bribery.

This will be the case no matter where in the world the "associated person" commits the offence.

Example: Company B is looking to develop new golf courses in China, where it has yet to conduct any business. Mr. X, an employee of Company B, pays a bribe to a public official in China to enable Company B to acquire land for potential new development. Because Company B has a UK subsidiary, Mr. X would be considered to be an "associated person" of Company B. Company B could be at risk of prosecution in the UK for the Corporate Offence, even though the act of bribery occurred in China.

1. The agreement reached with the SFO under a DPA was for €991 million and related to five counts of failure to prevent bribery under section 7 of the UKBA between 2011 and 2015 across the same number of jurisdictions: Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana.
2. A DPA is effectively a settlement agreement between the SFO and the organisation being prosecuted. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain conditions. DPAs can be used for fraud, bribery and other economic crime. They apply to organisations, but not individuals.
3. UKBA, section 1
4. UKBA, section 2
5. UKBA, section 6
6. UKBA, section 7
7. UKBA, section 3 and 4
8. This permits companies to make payments for the purpose of expediting the performance of routine governmental actions, such as clearing goods through customs, although it does not extend to payments made for the purpose of obtaining a particular substantive decision from a governmental agency.
9. The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)
10. UKBA, section 11
11. For the purposes of the MSA, turnover is calculated as the turnover of an organisation and the turnover of any of its subsidiary undertakings (including those operating wholly outside the UK).
12. That is, those deeming themselves outside the scope of the UKBA typically also do so for the purpose of the MSA, albeit some organisations do still prepare a Statement, but make clear that they are doing so voluntarily.
13. Note that, currently, submission to the Government-run reporting service is voluntary (although encouraged) but due to become mandatory in one of the proposed changes to section 54 of the MSA (but the timing of the necessary legislative changes is unclear).
14. R (on the application of KBR, Inc) v Director of the Serious Fraud Office [2021] UKSC 2
15. UKBA, section 1
16. UKBA, section 14(2)