

Corporate Crisis Management Newsletter Natural Resources and Energy Newsletter



UK Bribery Act

Writer: Kaku Hirao, Mark Tudor, Yoshiaki Otsuki

Due to many factors, including the international nature of the energy and natural resources (“ENR”) sector, the location of many projects in countries perceived to be at “high risk” for bribery and the vast amounts of money involved in developing and operating ENR projects, the ENR sector has a higher risk of exposure to bribery than other industries.

In an environment in which both Governments and shareholders are demanding increased and better corporate governance and compliance with anti-bribery legislation it is important for companies to understand the risks related to bribery.

Whilst the US Foreign Corrupt Practices Act (“FCPA”) has been in place since 1977, the UK Bribery Act 2010 (“**Bribery Act**”) is more recent, has a significantly wider scope than the FCPA and is considered to be the toughest anti-corruption legislation in effect.

In this newsletter, we provide a reminder of the offences under the Bribery Act and how they might impact a Japanese company or individuals operating in the ENR sector.

Overview of the Bribery Act Offences

The Bribery Act creates offences relating to:

- *failure by a commercial organisation to prevent bribery (“Corporate Offence”);*
- *“active” bribery (ie bribing): offering, promising or giving a bribe;*
- *“passive” bribery (ie being bribed): requesting, agreeing to receive or accepting a bribe; and*
- *bribery of a foreign public official.*

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The active bribery, passive bribery or bribery of a foreign public official are for the purpose of this note referred to as the “**Bribery Offences**”.

The offences under the Bribery Act are more extensive than those in the FCPA. They extend beyond bribery of foreign public officials to the active and passive bribery of or by individuals and companies and, unlike the FCPA, there is no exception for “facilitation payments” (ie a “*facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action*”).

The Bribery Act contains detailed definitions for various key concepts (for example, “*foreign public official*”, “*relevant function or activity*”) and for the purposes of this note we have simplified these in order to give a high-level overview and for ease of understanding.

1. The Corporate Offence

The Corporate Offence applies to bribery by a “*relevant commercial organisation*” carrying on business in the UK (or an “*associated person*” acting on its behalf) in order to retain or obtain business or a business advantage.

A “*relevant commercial organisation*” (“Corporate”) that can commit the Corporate Offence is:

- a body incorporated / partnership formed in the UK (even if it does not carry out business in the UK); or
- a foreign (eg Japanese) body corporate / partnership which carries on part of its business in the UK.

“*Associated person*” is widely defined and covers all persons performing services for or on behalf of the Corporate and so may include employees, agents, joint venture partners and subsidiaries. Whether a service provider is an *associated person* depends on the circumstances rather than by the relationship (although it is assumed that an employee performs services on behalf of the Corporate).

Why should Japanese companies be concerned with the Corporate Offence?

The scope of businesses that could be convicted of the Corporate Offence covers:

- (a) Japanese companies that carry out any business in the UK (either directly or through a branch office); and
- (b) UK incorporated subsidiaries of a Japanese company.

These businesses could be convicted of the Corporate Offence:

- regardless of where in the world the bribery took place;
- regardless of whether the person committing the underlying offence had any connection with the UK¹; and
- in the case of a Japanese company operating in the UK, even if the UK office of the Corporate was not involved in the bribery.

For example, a Japanese company that carries out business in the UK could be convicted by the UK courts of the Corporate Offence in respect of a bribe paid by one of the company’s employees / agents / joint venture partners in South America.

¹ A “close connection with the UK” is a requirement of the other offences under the Bribery Act – see section 2 below).

Are there any defences?

The Corporate Offence is a strict liability offence (ie fault or intention is not necessary in order to be convicted). The Bribery Act contains a defence that the corporate has “adequate procedures” in place to prevent bribery, however, it is difficult to define what are *adequate procedures*.² The intention behind having this as a defence is to encourage UK companies and non-UK companies that do any business in the UK to put in place robust anti-bribery procedures.

The defence of duress may also be available under English common law where, for example, there was no alternative but to pay a bribe in order to protect against loss of life or physical harm or to protect liberty.

What are “adequate procedures”?

The Bribery Act does not set out what “adequate procedures” means and guidance note provided by the Ministry of Justice (“**Guidance**”) also only provides general principles to assist Corporates in determining for themselves whether their procedures are adequate. The Guidance advocates that Corporates adopt a risk-based approach to managing bribery with anti-bribery procedures that are proportionate to the risks faced by the Corporate and which are based on the following six (6) principles:

(1) Proportionate Procedures

Procedures to prevent bribery should be: (a) proportionate to the risk the Corporate faces; and (b) clear, practical, accessible, effectively implemented and enforced.

(2) Top level Commitment

The top level of management (eg directors) must be commitment to preventing bribery by the business and should create a culture in which bribery is never acceptable.

(3) Risk Assessment

The Corporate should assess the nature and extent of the internal and external risks of bribery. This assessment should be performed periodically and the results recorded.

(4) Due Diligence

Due diligence should be conducted on parties who perform (or will perform) services for or on behalf of the business. The approach should be proportionate and risk-based.

² There are some other defences which would only apply in very exceptional situations (eg the bribery was committed by a member of the UK intelligence services in the course of their duties)

(5) Communication (including Training)

The Corporate should seek to ensure that bribery prevention policies and procedures are embedded in and understood by the organisation by internal and external communication (including training) that is proportionate to the risk faced by the Corporate.

(6) Monitoring and Review

Monitoring and review of the effectiveness of bribery prevention procedures and making improvements where necessary.

The Guidance provides that ultimately the “question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.” Obviously there is a risk that procedures developed by a Corporate in good faith could later be determined by the courts not to be adequate.

The adequacy of the procedures the Corporate has in place will depend on various factors (for example, the nature of the business and the countries in which it operates). Given, for example, the exposure that ENR businesses often have to governments (eg requirements for various governmental licences to carry out extraction activities) it is likely that the standard of anti-bribery procedures necessary for an ENR company to successfully use the “adequate procedures” defence will be higher than the standard of procedures adopted in some other business sectors.

Potential Penalties for the Corporate Offence

Penalties for committing offences under the Bribery Act are severe.

For the Corporate Offence there is the possibility of an unlimited fine for the Corporate. As the Corporate Offence is a criminal conviction the Corporate could also be subject to other sanctions such as confiscation of assets and exclusion from tendering for public contracts.

In some cases the Serious Fraud Office (“**SFO**”) may enter into negotiations for a deferred prosecution agreement (“**DPA**”). In this situation the Corporate will be charged with the offence but proceedings will be suspended for a defined period of time if a judge approves that the DPA is in the interests of justice and the DPA’s terms are fair, reasonable and proportionate. The SFO will only invite a Corporate to discuss a DPA where the Corporate has fully co-operated with their investigations. The DPA is likely to require the Corporate to agree to and abide by certain terms (for example, payment of a financial penalty, paying compensation and co-operating with future prosecutions of individuals).

To date there have been few convictions under the Bribery Act and only two (2) DPA’s concluded and approved by the courts and so there is not a large body of precedent to assist in predicting the attitude of the courts.

The sentencing guidelines for bribery offences (“**Guidelines**”) provide a procedure for establishing the financial penalties that should be imposed on a Corporate that is convicted of the Corporate Offence and these will be used as a reference by the SFO and the courts when negotiating and approving DPAs.

The Guidelines provide for:

- a compensation order for any personal injury, loss or damage resulting from the Corporate Offence;
- confiscation the Corporate's assets that are the proceeds of the crime (if requested by the prosecutor or if the court thinks it appropriate); and
- a fine. The size of the fine will depend on the culpability of the Corporate and the harm caused. In "high" culpability cases the Guidelines provide for a fine of 250% to 400% of the "Harm" caused (with the starting point of a 300% fine to be adjusted depending on the seriousness of the offence and any mitigating factors (eg previous good behavior of the Corporate)). The "Harm" is the amount the court determines to be the actual or intended gain from the commission of the Corporate Offence and if evidence of the potential gain cannot be verified then the Guidelines suggest that an appropriate amount may be 10-20% of the Corporate's worldwide revenue derived from the product or business area to which the offence relates (for the period of the offending).

The court is also required to consider the overall effect of its orders by "stepping back" and taking into account the intention of the Guidelines to achieve: (a) the removal of all gain from the party committing the offence; (b) appropriate additional punishment, and (c) deterrence. The court used this power in the most recent DPA in which (despite the range of the potential fine before mitigation being £16.37 million to £26.2 million) the actual fine imposed was small – as to impose any larger fine would have made the company insolvent. In this case the court was satisfied that on the facts of the case the overall sum payable was fair, reasonable and proportionate (the total payment of the fine plus confiscation of profit made from the alleged bribery amounted to the "gross profit" of £6.55 million made from the transactions).

However, in the first DPA with Standard Bank Plc the award in relation to a US\$ 6 million payment (which generated US\$ 8.4 million in fees) was much higher and the bank agreed to pay:

- US\$25.2 million to the UK government (a \$16.8 million fine plus US\$8.4 million recovery of profits);
- US\$7 million in compensation to the Government of Tanzania (US\$6 million, plus interest of US\$1,046,196.58); plus
- £330,000 in relation to the SFO's costs of the investigation and subsequent resolution of the DPA.

2. The Bribery Offences

How is a Bribery Offence committed?

A Bribery Offence is committed if:

- any part of the Bribery Offence takes place within the UK; or
- a person with a "close connection with the UK" commits an act or makes an omission outside the UK (which would have been a Bribery Offence if committed in the UK).

Persons with a "close connection with the UK" include (amongst others) British citizens, individuals ordinarily resident in the UK and a body incorporated under the law of any part of the UK (eg a UK subsidiary of a Japanese company).

Unlike the Corporate Offence proof of intent is required for a conviction under the Bribery Offences (see below).

2-1. Active Bribery

The Active Bribery offence is committed if a person (“**A**”) offers, promises or gives (directly or indirectly) any financial or other advantage (“**Bribe**”) to person “**B**” either:

- intending to bring about or reward the “*improper performance*”³ by A of a “*relevant function or activity*”⁴ (“**Function**”); or
- where A knows or believes that acceptance of the Bribe by B would itself be the improper performance of the Function.

For Active Bribery it does not matter if the Bribe is offered, promised or given:

- to a person other than the person responsible for performing the Function (for example, it is not paid to B but is paid to B’s brother); or
- by A directly or through a third party (for example, by A’s agent).

2-2. Passive Bribery

The Passive Bribery offence is committed if a person (“**C**”) requests, agrees to receive or accepts a Bribe either:

- intending that, due to the Bribe, a Function should be performed improperly (either by C or another) (“**Case 1**”);
- where the request, agreement or acceptance by C itself is improper performance of a Function (“**Case 2**”);
- as a reward for improper performance (by C or another) of a Function (“**Case 3**”); or
- in anticipation of, or as a result of C requesting, agreeing to receive or accepting a Bribe, a Function is performed improperly by C (or by another person at C’s request or with C’s assent or acquiescence) (“**Case 4**”).

In all cases it does not matter if the Bribe is to be:

- received by C directly or through a third party; or
- for the benefit of C or another person.

In Case 2, Case 3 and Case 4 it does not matter whether C (or in Case 4 the person performing) knows or believes that the performance of the Function is improper.

2-3. Bribery of a Foreign Public Official

Bribery of a foreign public official⁵ is committed by a person who intends to influence a foreign public official in the performance of

³ “Improper performance” is when either:

- (a) the performance of; or
- (b) failure to perform,

the Function is in breach of the expectation that a reasonable person in the UK would have had in relation to the performance of such Function.

⁴ A “*relevant function or activity*” is any: (a) function of a public nature; (b) activity connected with a business, trade or profession; (c) activity performed in the course of employment; or (d) activity performed by or on behalf of a body of persons (whether incorporated or unincorporated), which in all of the cases (a) to (d), the person performing is:

- expected to perform in good faith;
- expected to perform impartially; or
- in a position or trust due to its performance.

There is no need for the Function to have a connection to the UK or to be performed in the UK.

⁵ There is a detailed and wide definition of a “foreign public official” in the Bribery Act.

the official's duties in order to obtain or retain business or an advantage in business.

The requirements of this offence are that:

- a person ("D") either directly or through a third party, offers, promises or gives any financial or other advantage to the foreign public official ("FPO") (or another person at FPO's request or with FPO's consent or acquiescence); and
- FPO is not permitted by applicable written law to be influenced by the offer, promise or gift⁶.

The behaviour that is subject to the influence can be positive acts (eg granting of a required licence) or omissions (eg the FPO not issuing a notice to prosecute D for breach of a licence). It is not relevant that the intention to influence is aimed at a function that is outside of the official's authority and it is not necessary to show that the official actually acted improperly as a result of the influence.

2-4. Penalties for Bribery Offences

Individuals committing any of the Bribery Offences can face up to ten (10) years' imprisonment and an unlimited fine.

Senior officers (eg directors, managers, company secretary) who consented to or connived in the commission of a Bribery Offence committed by the Corporate are also guilty of the offence and these individuals can be prosecuted where they have a "close connection with the UK". A senior officer may be liable to maximum penalty of ten (10) years imprisonment and/or an unlimited fine.

A Corporate may be able to negotiate a DPA for Bribery Offences.

3. Recommended Actions

3-1. Corporate Actions to Prevent Bribery

As noted above, the "Corporate Offence" is in principle a strict liability offence but UK Bribery Act also contains a defence that the corporate has "*adequate procedures*" in place to prevent bribery. There is no clear definition of "*adequate procedures*", however it is useful for every corporate to monitor and review its anti-bribery policy with reference to the six (6) general principles provided in the Guidance. Such a review by a company can be used as a defence to the Corporate Offence, and can also prevent bribery by the directors or employees. In addition, establishment of "*adequate procedures*" may also benefit a company in any investigation by other authorities, for example, under a US FCPA investigation the presence of anti-bribery policies is normally an important factor in assessing whether the corporate has any criminal liability.

3-2. Establishment of Anti-bribery Procedures - Risk-based Approach

As noted above, the six (6) principles include: (i) proportionality; and (ii) risk assessment. It is important for a corporate to properly assess the bribery risks pertaining to its business and to ensure that its anti-bribery procedures are proportionate to the risks that it faces. From a Japanese perspective, the recently amended METI guidance on foreign public official's bribery emphasizes the

⁶ In some countries the law expressly permits (and might require) officials to take into account financial or other advantages offered. For example, in a bid for oil exploration blocks the official criteria for bid assessment and award of the licence might allow consideration of amounts that a bidder is willing to pay for local training or to construct local schools or hospitals.

importance of prevention measurement to be taken by a corporate in proportion to the risks of bribery.

The risk of bribery depends on the country or jurisdiction in which the corporate carries out its business activities. There is a high perceived risk of bribery in the countries of Asia, Middle East, Africa and South America (for further details please refer to the Corruption Perception Index annually published by the international NGO “Transparency International”).

Bribery risk is also dependent on the nature of business. According to METI’s guidance on foreign public official’s bribery, the following activities have high risk of bribery:

- appointment and replacement of agents or consultants who provide services including advice and negotiation for the purpose of obtaining and maintaining local governmental permits or transactions with state-owned companies;
- selection of joint venture counter-parties or utilization of SPC in countries or businesses with a high-risk of bribery;
- acquisition of shares in a company having a track record of business related to the government in countries or businesses with high-risk of bribery;
- participation in public projects with a high-risk of bribery in terms of the value of the contract and the form of the contract; and
- direct or indirect social payment to foreign public officials.

In addition, companies need to understand the actual situation in each country in which business is conducted in order to understand the bribery risk in that jurisdiction. For this purpose, some companies conduct hearings or interviews with their local employees to understand the real risk of bribery “on the ground”.

3-3. Establishment of Anti-bribery Procedures - Due Diligence

Considering most of the cases which have been investigated, bribery offences are usually committed by a local agent or consultant retained by the corporate. It is almost impossible for a corporate to argue against the authorities that it did not know of such bribery acts committed by the agent or consultant. Accordingly, it is important to do due diligence in the course of appointing a local agent or consultant. A corporate should conduct its due diligence on a risk-based basis taking account of the points made above. For example, in high-risk countries or areas, or in businesses at a high-risk of bribery, it may be necessary to retain a professional investigator to check the background of the agent or consultant rather than merely relying on a questionnaire completed by the agent.

After appointing an agent or consultant, a corporate needs to monitor their activities. For example, if the agent requests incremental costs or additional fees it will be important to verify what these are for. If there is a risk that the agent is paying bribes, action should be taken based on the evidence and where there are serious concerns about their behavior it may be necessary to take further action such as terminating the agreement with them.

3-4. Establishment of Anti-bribery Procedures - Commitment by Management and Education of Employees

There are certain countries where bribery has been perceived as a normal social custom for a long time and this will not change or disappear immediately. People who work in such countries or areas always face the risk of bribery. It is not so effective merely to say “do not bribe” to staff in these countries, as they might regard this as a policy implemented by their head office who are ignorant of the actual situation on the ground in that country. For this reason, management themselves must show their sincere attitude towards bribery prevention and this is expressed in the six (6) principles as “top level commitment”. By adopting such an attitude and through understanding the actual situation in the location and through discussion with the local employees the anti-bribery procedures of a corporate can become effective. As noted above, it is important to conduct a hearing or interview with local staff in the course of risk assessment. However, it is more important that the management of the corporate shows the local employees its sincere attitude towards bribery prevention, and only through conversation with the local employees can the anti-bribery procedure be made effective and practical



[Kaku Hirao](#)

Partner, Attorney-at-Law
k_hirao@jurists.co.jp

Kaku Hirao served as a public prosecutor for 13 years and in 2011, joined Nishimura & Asahi and now serving as a partner at the Corporate Crisis Management Team. He deals with variety of corporate crisis matters such as investigation by authorities to companies, misconduct by executives or employees, negotiation with investigative and administrative authorities, civil and criminal litigation derived from corporate crisis. He also deals with cross border issues such as investigations by foreign authorities. He also advises clients on how to build up the strong compliance structure within companies, especially to prevent bribes or cartel activities.



[Mark Tudor](#)

Partner (Foreign Law Partner*)
m_tudor@jurists.co.jp

Mark Tudor joined Nishimura & Asahi in May 2016 and has over 18 years experience advising in the energy and natural resources (with 10 of those years being in Japan with an international law firm). Most recently he worked for an FPSO and engineering contractor and has experience advising on onshore and offshore FEED, EPC and other engineering and construction contracts and on development of oil, gas and LNG projects.

*Please note that we are not engaged in a Gaikokuho Kyodo Jigyō (the operation of a foreign law joint enterprise).



[Yoshiaki Otsuki](#)

Attorney-at-Law
y_otsuki@jurists.co.jp

Yoshiaki Otsuki joined Nishimura & Asahi in 2004 after graduating University of Tokyo and admitted in Japan in 2004. He mastered L.L.M of University of Southern California Gould School of Law in 2011 and was admitted in New York in 2012. He worked for Nippon Steel & Sumitomo Metal Corporation from 2012 to 2014. He is now seconded to Japan Oil, Gas and Metals National Corporation (JOGMEC). Recently he has been involved in some LNG development and procurement projects.