

TERMS OF REFERENCE

COMPARATIVE ANALYSIS OF THE UK BRIBERY ACT (2010) AND ANTI-CORRUPTION LEGISLATION IN THREE COUNTRIES

Title:	Comparative analysis of the UK Bribery Act (2010) and anti-corruption legislation in three countries
Project location:	Remote
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Language(s) required:	English
Start of contract:	15 February 2021
End of contract:	31 March 2021
Consultancy days:	Between 15 and 20 days (to be indicated in the financial proposal)

SUMMARY

The aim of this assignment is to develop a comparative analysis of the UK Bribery Act (2010) and anti-corruption legislation in three other countries for the purpose of identifying areas for legislative improvement in the selected countries. The findings of this assignment will enable WFD to support the development of legislative drafting guidance in the three countries, thus contributing to a favourable climate for business, trading and investing abroad.

1. CONTEXT

1.1. UK Bribery Act (2010)

The [UK Bribery Act \(2010\)](#) consolidated the complicated pre-existing law in the UK and established the following criminal offences: (i) bribing; (ii) being bribed; (iii) bribing a foreign public official (FPO); and (iv) a corporate offence of failure to prevent bribery.

The first two prohibit a person from offering, promising, or giving a bribe; or from requesting, agreeing to receive, or accepting a bribe. The UK Bribery Act defines a bribe as a “financial or other advantage”, which captures a broad range of inducements. An essential element of both offences is that the bribe must be connected to “improper performance” of a relevant function or activity: the bribe must be intended to actually secure, or amount to the improper performance of, a function or activity by the recipient.

The third offence, bribing a foreign public official (FPO), is committed by offering, promising, or giving an advantage to an FPO, or to another person at the FPO’s request, in circumstances where the giver of the bribe intends to influence the official in his or her capacity as an FPO, and to obtain or retain business or a business advantage. This is a more targeted offence designed to be easier to prove, with no requirement for “improper performance” to be shown for the offence to be committed. However, the offence does not apply where the advantage to the FPO is permitted or required by the written law applicable to that FPO. Unlike the US Foreign Corrupt Practice Act, there is no exception for facilitation payments. These are illegal under the UK Bribery Act.

The distinct and strict liability offence of bribery of a FPO closely follows the requirements of the [1997 OECD Convention](#) on the Bribery of Foreign Public Officials in International Business Transactions.

In accordance with the UK's involvement in international efforts to combat bribery and corruption, these offences have extraterritorial effect (meaning that the offences cover activity which takes place outside the UK), provided that the act or omission would have amounted to an offence had it occurred in the UK and the person who took some part in committing the offence has a close connection with the UK, for example British citizens and entities incorporated under UK law.

A company may be convicted of the first three offences, but this is difficult in practice. The prosecutor would need to prove that a very senior person in the organisation committed the offence, so as to hold the corporate liable (the 'directing mind and will' test). For this reason, the corporate offence of failure to prevent bribery was introduced by section 7 of the UK Bribery Act. A commercial organisation may commit this offence when a person associated with it, such as an employee, agent, or contractor, bribes another person, with the intention of obtaining or retaining business or a business advantage for that organisation. This is intended to be so broad as to encompass anyone connected to an organisation that could commit bribery on its behalf. It is irrelevant that the organisation was unaware of the bribery and so it is, in effect, a strict liability offence. However, the organisation has a defence if it had put in place 'adequate' procedures to prevent bribery.

'Adequate procedures' are not defined in the UK Bribery Act, but government guidance accompanying it offers some assistance. For the most part, it is left to the organisation to conduct its own risk assessment and take a view on what constitutes 'adequate' measures, based on the six principles (see below). However, the focus is on active and effective procedures, rather than paper policies.

1.2. Implementation of the UK Bribery Act

Reviewing its implementation and impact, the UK House of Lords Select Committee on the Bribery Act 2010 published its [Post-Legislative Scrutiny Report](#) on March 14, 2019. While the report highlighted that the UK Bribery Act is an "excellent piece of legislation" and "an example to other countries", it sets out 35 recommendations and conclusions around the implementation and enforcement of the Act. For instance, the Committee requested greater clarity as to where the dividing line should be between what is considered legitimate corporate hospitality and what would be considered as bribery.

The Committee looked at [Deferred Prosecution Agreements \(DPAs\)](#). Although not derived from the Bribery Act, DPAs have had a major influence on some of the largest recent cases of corporate corruption, allowing them to be settled without the companies involved being convicted of the offences. When the new regime began, there was some anxiety that it might be, or at least be seen to be, an easy way out, especially for large companies. The Committee looked at this carefully and is satisfied that this is not the case. The Committee believes that the discounts being applied to financial penalties are appropriate to encourage companies to self-report but not so large as to deprive the penalty of its effectiveness. The Committee is also clear that a DPA with a company is not, and cannot be, a substitute for the prosecution of any individuals involved in corrupt conduct.

In its [response](#) to the Committee's report, the Government supported the recommendation not to change the law in relation to facilitation payments, which it considers a form of bribery which should not be legalised.

The Ministry of Justice provides guidance based on [6 principles](#) to help businesses decide on what they might need to do: Proportionality; Top-level commitment; Risk assessment; Due diligence; Communication; and Monitoring and review.

UK Embassies / High Commissions (often) provide guidance to companies on undertaking business in a country, promoting standards of trade integrity and advise how to report bribery offences and how the UK Bribery Act applies outside the UK.

Since its introduction in 2010, the UK Bribery Act has [primarily been applied against individuals](#) rather than companies. Corporate Bribery Act cases has been resolved mainly through DPAs.

2. RATIONALE FOR THE COMPARATIVE ANALYSIS

Over the past years, many countries have sought to increase awareness of corruption and strengthen their anti-corruption legislative frameworks.

For instance, in June 2020, the corporate liability provision under the Anti-Corruption Commission Act 2009 in [Malaysia](#) came into force. This means that a company may be held criminally liable for acts of corruption by its directors, employees, or other associated persons. This exposes an organisation and its management to strict liability unless it can prove it had adequate policies and procedures in place to prevent bribery.

However, what constitutes corruption still varies from jurisdiction to jurisdiction. Significant differences across countries remain, causing headaches for policy makers and companies seeking to implement a global anti-corruption policy. For instance, private sector bribery is expressly criminalised in most countries, but not in [India](#) or [Indonesia](#). Giving a bribe to a FPO is a criminal offence in [Thailand](#) but not in [the Philippines](#). Such discrepancies force companies to comply with different rules in different places.

When setting out the key elements of bribery offences in each jurisdiction, one needs to look at how the offences are treated in relation to intermediaries, private sector, public officials, facilitation payments, gifts and hospitality, extraterritorial applicability, and enforcement.

Against this background, this assignment foresees in drafting a comparative analysis of the UK Bribery Act (2010) and anti-corruption legislation in three other countries. The analysis will identify the main features of the UK Bribery Act and anti-corruption legislation in three other countries and draw lessons learned from their implementation, including the identified gaps or contradictions, as well as the application of corporate criminal liability for corruption offenses.

The study will thus provide an assessment of existing anti-corruption legislation in selected countries against the main features and lessons learned from the implementation of the UK Bribery Act and, if and where useful, make a reference to international benchmarks on national anti-corruption legislation (for instance from OECD).

This paper will be relevant in three ways: (1.) enable WFD Country Offices to engage with the relevant parliamentary committees, government officials, business community, legal professionals, anti-corruption agencies and other stakeholders regarding the anti-bribery legislation in their country, and how to improve it; (2.) solicit (political and financial) support from UK Embassies / High Commissions to work on legislative initiatives strengthening the anti-corruption framework in selected countries; (3.) contribute to a more favourable and fair climate for business, trading and investing abroad, as promoted by the [UK Trade Envoys](#).

3. SELECTION OF COUNTRIES

The relevant legislation and practices in three WFD programme countries will be analysed: **Indonesia, Ukraine, and Kenya**. These countries have been selected for several reasons:

- The three countries have significant weight and relevance in their region / continent.
- There is broad political interest in anti-corruption policies within the country.
- Each country is a parliamentary democracy in a presidential system.
- There is a sufficient body of anti-corruption and anti-bribery legislation in place.
- The choice reflects geographical diversity: one country from Asia, one from Eastern Europe and one from Africa.
- The WFD country team has potential and interest to follow-up on the findings of the study with their national parliament and other stakeholders.

4. SCOPE OF WORK

The purpose of this assignment is to draft a comparative analysis of the implementation and impact of anti-corruption legislation in the UK and three selected countries, as follows:

1. To identify key characteristics of the UK Bribery Act 2010. The authors may choose 2 or 3 “innovations” of the UK Bribery Act which they find most relevant/applicable for the analysis of the selected countries, such as:
 - Definition of bribery and associated extra-territorial jurisdictional reach,
 - Concept of a corporate offence / corporate criminal liability for corruption offenses, and “adequate procedures” to prevent bribery;
 - Accessibility of the Act to enforcement agencies, types of penalties, DPAs and self-policing / self-reporting mechanisms;
 - Guidance on the implementation of the Act, such as through the “6 principles”;
2. To review national anti-bribery legislation in three countries in terms of:
 - The definition of a bribe, public official and foreign public official, application beyond national boundaries;
 - How are gifts and hospitality, bribery through intermediaries, company liability for actions of their subsidiaries, facilitating payments and adequate compliance procedures covered;
 - One example regarding the effects of incomplete anti-bribery legislation and the impact of its weak enforcement within one sectorial area.
 - Enforcement mechanisms and identified trends in legislative implementation;
 - Potential and obstacles for advancing key elements of the UK Bribery Act (as chosen from point 1) and other lessons learned.
3. To identify areas for legislative improvement in the three countries based upon the comparative analysis and lessons learned from the implementation of the legislation.

4. DELIVERABLES

- A 25 to 30-pages paper, in English. The paper will include a bibliography of (academic, policy and practitioners) resources on anti-bribery policies and legislative impact assessments relevant to the selected countries or the region(s) at large. The bibliography should prioritize on and include the hyperlinks to on-line accessible resources.

- A blog post to promote the comparative analysis to a wider, non-specialist audience, co-authored with the WFD Senior Governance Adviser.
- Participation in the international webinar launching the comparative paper.

5. METHODOLOGY

- The paper will be developed based upon desk research, with additional input emerging from interviews with parliamentary and government officials, legal and anti-corruption experts.
- The draft paper will be reviewed by a “reference group” of WFD staff and thematic experts.
- The consultant will prepare a workplan within 1 week of the start of the assignment.
- The process will be overseen by the WFD Senior Governance Adviser.

6. REFERENCE RESOURCES

- Clifford Chance (2019), [A Guide to Anti-Corruption Legislation in Asia Pacific - 6th Edition](#)
- De Vrieze F. and Norton, P. (2020), [The Significance of Post-Legislative Scrutiny](#), Journal of Legislative Studies, Vol 26 (3), 2020, p. 349-361.
- Dentons (2020), [Global Anti-Bribery and Anti-Corruption Laws: Comparison of key points in select jurisdictions](#)
- House of Lords (2019), [The Bribery Act 2010: post-legislative scrutiny](#).
- Leitao, A.(2016), [Corruption and the Environment](#), Journal of Socialomics, June 2016
- NAVEX Global (2018), [Fighting Bribery and Corruption on the Global Stage](#)
- OECD (2020), [Anti-Corruption Reforms Eastern Europe-Central Asia - Progress and Challenges 2016-2019](#)
- OECD (2020), [Foreign bribery and the role of intermediaries, managers and gender](#)
- Rahman, A. (2020), [UK: Anti-Corruption & Bribery Comparative Guide](#)
- Todd, R. (2020), UK Bribery Act 10 years on, [conference speech](#).
- UNEP (2019), [Environmental Rule of Law: First Global Report](#).

7. QUALIFICATIONS OF EXPERT

Relevant work experience:

- Understanding of anti-corruption policies, business and financial legislation;
- Relevant knowledge of financial services or international business development;
- Experience in drafting comparative, multi-country policy analysis;
- Understanding of legislative processes in different constitutional systems;
- Knowledge of different types of corporate, partnership and trust entities and money laundering regulations would be advantageous.

Technical and functional competencies:

- Excellent analytical, research and writing skills;
- Commitment to accountable governance;
- Experience working collaborative and in teams;
- Excellent organisational skills.

APPLICATION

Interested candidates can submit their application, including:

- Application letter
- CV, incl. 2 reference persons
- Technical proposal (between 750 and 1,250 words) with proposed methodology and comments on the substance of the assignment.
- Financial proposal (between 15 and 20 days, up to 9,000 GBP max.)
- Sample of recent publication or written consultancy output.

Proposals by an individual, or a team of two or three individuals are welcome. In case a team of two or three individuals applies, please indicate the division of work between the experts.

Send to: Franklin.Devrieze@wfd.org
by Wednesday 10 February 2021, 23:59 h. (UK time).