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# Anti-Bribery and Anti-Corruption Legislation in the EU, UK, US and Canada

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# 01. About The Authors

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Conor O'Donoghue is a Regulatory Specialist in the Global Regulatory Compliance Team within Compliance & Risks.

He supports clients with their compliance obligations in relation to Packaging, Anti-Bribery and Corruption, and RoHS.

Conor holds a Bachelors of Law from University College Cork and an LL.M. in Environmental and Natural Resources Law, also from University College Cork.

**Kelly Bugiera, Senior Regulatory Compliance Specialist, Compliance & Risks**

Kelly has been a Senior Regulatory Compliance Specialist at Compliance & Risks since June 2022.

Kelly's role specializes in research and monitoring for US state and federal legislative and regulatory activity related to all aspects of our product and topic coverage. Kelly also works on special customer consulting and assessment projects that cover international standards and regulatory activity. Areas of special focus include chemicals, product safety, gas appliances, and drinking water.

Prior to joining Compliance & Risks, Kelly led a team of information and compliance professionals at a consumer product testing lab where she worked for over 28 years. During her tenure there, Kelly managed and produced all content for an international regulatory and compliance database, researched international regulations and standards for a variety of consumer products, as well as provided consultation to global manufacturers and retailers in the areas of testing and product safety.

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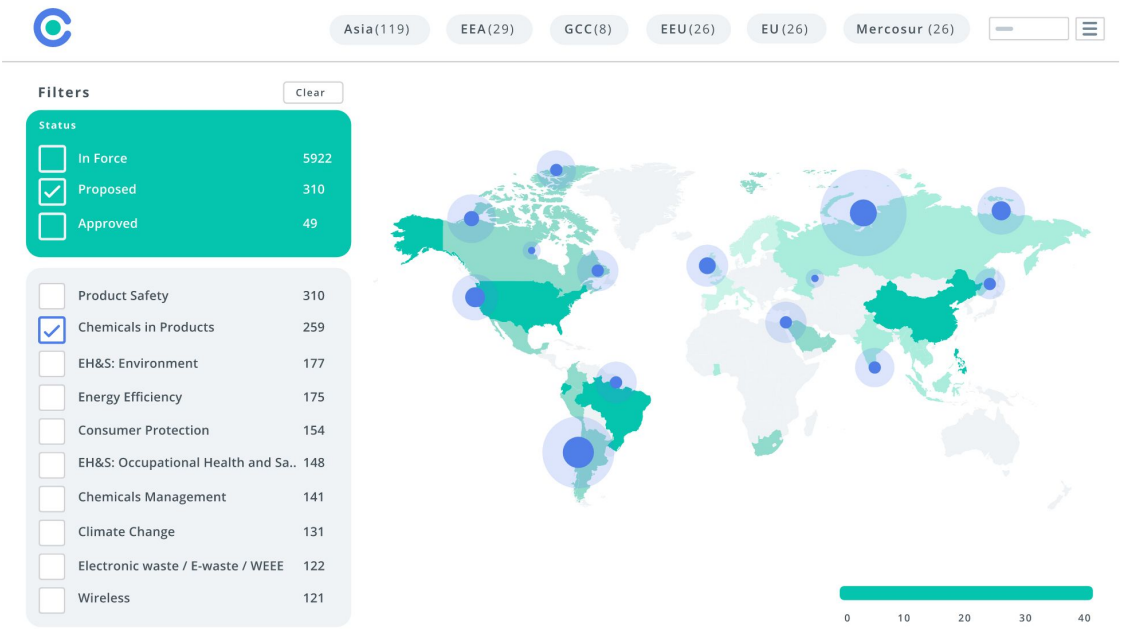


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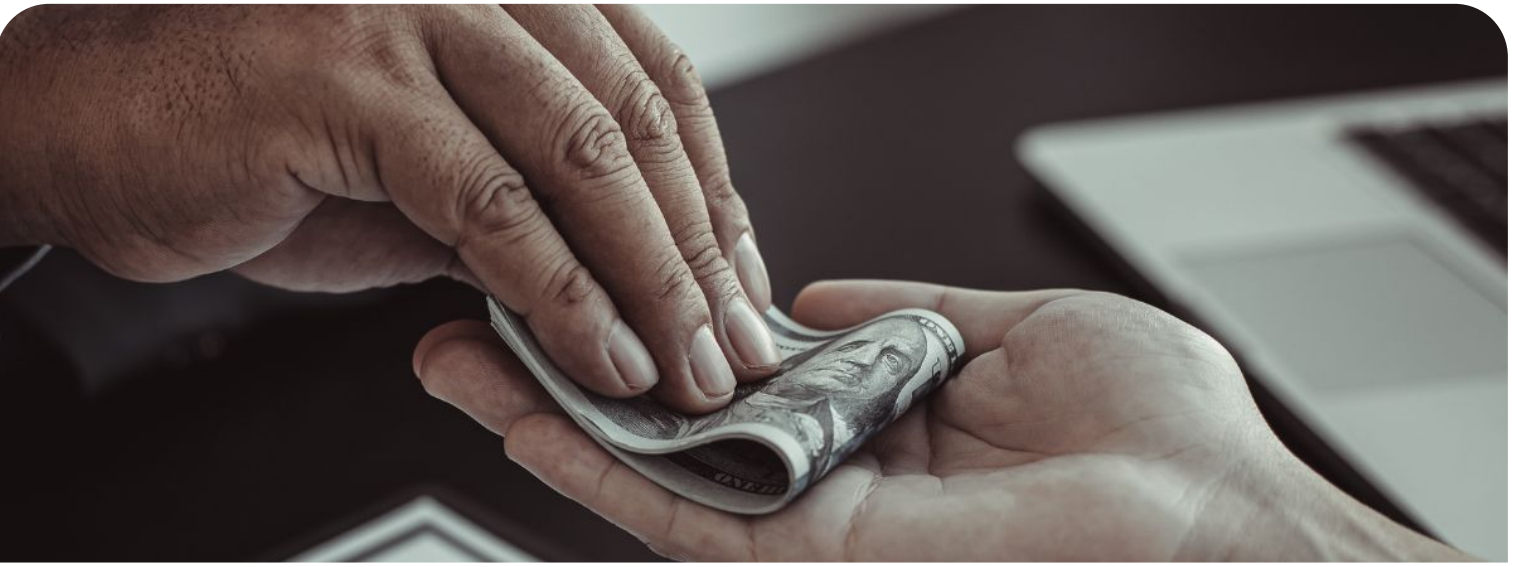

# 03. Introduction

The topic of Anti-Bribery and Anti-Corruption (ABAC) includes mandatory laws, regulations and standards that are either proposed or enacted, as well as voluntary frameworks, guidance documents and factsheets, that address the prohibition of private organizations, and the individuals who work for them, from engaging in bribery and corruption.

Corruption exists in every country around the world and is a concern of the entire global community.

It can be engaged in by private individuals, public officials and businesses.

There can be domestic offences in the form of private to public bribery/corruption or private to private bribery/corruption.

Additionally, there can be offences that involve attempts to bribe or corrupt foreign officials.

Bribery and corruption can take different forms, from the giving and taking of gifts, to conflicts of interest, to undue influence.

There are many different definitions of bribery and corruption, but it is generally accepted that, whichever definition is used, there are these common elements:

***An act of bribery or corruption involves a person in an appointed position, or who has been entrusted with power, who acts voluntarily, in breach or abuse of that trust, in exchange for private gain.***

Acting in a manner that is ***corrupt*** generally refers to acting with improper personal purpose.

Examples of corruption can include:

- Making or providing false or misleading statements;
- Withholding information; or
- Influencing another person.

A ***bribe*** is generally regarded as a gift, consideration or advantage that is given to someone as an inducement to, a reward for, or on account of, the person performing an act in relation to his/her office, employment, position or business.

Often, requirements associated with ABAC efforts include company disclosure and reporting of the following types of information:

- Lack of policies on ABAC and future plans for implementing such policies;
- Procedures for investigating business incidents of corruption and bribery;

- Policies for training with respect to corruption and bribery;
- Systems used to prevent and detect, investigate, and respond to allegations or incidents relating to corruption and bribery;
- Metrics on incidents of corruption and bribery and their outcomes.

Other ABAC legislation may prohibit bribery or other specific types of unethical behavior that is intended to help a business garner favor.

In addition, there may be requirements not only to report on internal training policies in the area of ABAC, but there may be obligations to conduct training.

There could also be legislation addressing the protection of whistleblowers who come forth with information about bribery or corruption within the organization.

Compliance & Risks' coverage of ABAC focuses on requirements of private companies as far as ensuring their workforce is not engaging in bribery or other corrupt acts, as covered by law.

This could include requirements regarding private company employees and their interactions with other private companies, financial institutions or government agencies (foreign and domestic).

# 04. United Nations Convention against Corruption (UNCAC)

The *United Nations Convention against Corruption (UNCAC)* is the only universal anti-corruption instrument that is legally binding.

UNCAC was negotiated and drafted in Vienna, Austria in 2002-2003. It was then adopted by the United Nations General Assembly on 31 October 2003.

The adoption of the Convention represents a shared commitment by member countries of the UN to fight corruption on a global basis by:

- Taking a comprehensive approach to addressing problems with corruption;
- Emphasizing preventive measures and their importance;
- Focusing on criminalization and law enforcement;
- Stressing the importance of international cooperation;
- Recognizing the need for asset recovery.

The Convention plays a crucial role in uniting the international community against corruption by creating effective working relationships and fostering global cooperation. The Convention has been instrumental, on the national level, by aiding in the development of numerous important anti-corruption reforms, prompting important changes to legislative and institutional frameworks and strengthening international cooperation in cross-border cases and asset recovery. The UN Convention is also crucial to the 2030 Agenda and the Sustainable Development Goals by addressing the pervasive effects of corruption on all core values and principles of the United Nations.

UNCAC entered into force on 14 December 2005. As of 10 October 2023, it had 140 signatories and 190 parties.

The primary purposes of the UNCAC include:

- Promotion and strengthening of measures to prevent and combat corruption in a more efficient and effective manner;
- Promotion, facilitation and support of international cooperation, as well as technical assistance, in the prevention of and fight against corruption (including asset recovery);
- Promotion of integrity, accountability and the proper management of public affairs and property.

This Convention applies to the prevention, investigation and prosecution of corruption. It also applies to the freezing, seizure, confiscation and return of any proceeds gained as a result of these offences.

As part of the global commitment to combating corruption, Article 5 of UNCAC addresses *Preventive Anti-corruption Policies and Practices.*

- State Parties shall, in accordance with their specific legal systems, develop and implement/maintain effective, coordinated anti-corruption policies which reflect the rule of law, proper management of public affairs and public property, integrity, transparency and accountability;
- State Parties shall work to establish and promote effective practices with the goal of the prevention of corruption;
- State Parties shall work to periodically assess relevant legal instruments and administrative measures in order to determine their adequacy in the prevention and fight against corruption;
- States Parties shall collaborate with each other, as well as with relevant international and regional organizations, to promote and develop necessary measures to fight corruption.

Article 12 of UNCAC provides specific measures to be taken by the private sector which include enhancement of accounting and auditing standards and, when appropriate, providing effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to non-compliance to these measures.

Specific actions that can be taken to achieve these ends may include:

- Promoting cooperation between law enforcement agencies and the private sector;
- Promoting the development of standards and procedures to safeguard the integrity of the private sector, including codes of conduct for proper performance of business activities and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;
- Promoting transparency among private entities, such as measures regarding the identity of individuals involved in the establishment and management of corporate entities;
- Preventing the misuse of procedures regulating the private sector, such as procedures for granting subsidies and licenses by public authorities for commercial activities;
- Preventing conflicts of interest by imposing appropriate restrictions on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement from public service;
- Ensuring that private entities have sufficient internal auditing controls to help them prevent and detect acts of corruption and that these accounts and any required financial statements are subjected to appropriate auditing/certification procedures.

Importantly, Article 21 deals with *Bribery in the Private Sector.*

State Parties shall consider the adoption of legislation, and other measures that may be necessary, in order to criminalize the following actions when they are committed intentionally in the course of economic, financial or commercial activities:

- The promise, offering or giving (either directly or indirectly) of an undue advantage to anyone who directs or works for a private sector entity so that he or she, in breach of his or her duties, acts or refrains from acting;
- The solicitation or acceptance (either directly or indirectly) of an undue advantage by anyone who directs or works for a private sector entity so that he or she, in breach of his or her duties, acts or refrains from acting.

Another important aspect of anti-bribery and anti-corruption requirements is protecting the informants or "whistleblowers" who come forward to report corrupt behavior and activities.

Article 32 of UNCAC deals with the *Protection of Witnesses, Experts and Victims*.

State Parties shall take the proper measures to provide effective protection from potential retaliation or intimidation for any witnesses and experts who give testimony concerning offences that have been established in accordance with this Convention.

This protection would also apply to relatives and others close to them. Such measures may include:

- Establishment of procedures for physical protection of witnesses, experts and victims such as relocating them and permitting non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- Implementation of rules that permit witnesses and experts to provide testimony in a way that ensures their safety, such as permitting testimony to be provided through communications technology like video or other adequate means;
- States Parties shall consider embarking on agreements or arrangements with other States for the relocation of witnesses, experts and victims who are witnesses.

The UN Global Compact promotes ten principles in the areas of human rights, labor, the environment and anti-corruption. The principle of anti-corruption (Principle #10) is derived from the UNCAC.

Per the UN Global Compact Guide to Corporate Sustainability, corruption has many negative impacts on business such as impeding growth, escalating costs and posing serious legal and reputational risks.

Corruption is also a substantial barrier to progress in societies, with a disproportionate impact on communities that are economically disadvantaged.

Corruption increases costs associated with transactions, undermines fair competition, and serves as a barrier to long-term foreign and domestic investment.

Additional more stringent regulations dealing with corruption continue to emerge in the international community.

This new regulatory environment has encouraged companies to focus on measures to protect their reputations, as well as the interests of their shareholders.

Investors know that corruption negatively impacts value and poses risks to their investments as far as finances, operation and reputation.

Companies should recognize that, as part of their corporate sustainability strategy, they need to adopt robust anti-corruption measures and practices.

The Global Compact, along with partners, are working to assist companies on a variety of anti-corruption issues such as risk assessment, reporting and supply chain practices.

The Global Compact is also working with businesses to mobilize them in order to create a united voice against corruption since global action is necessary to bring an end to a systemic issue that is too far-reaching and complex for each company to handle on their own.

# 05. European Union (EU)

According to the EU Commission, it is estimated that corruption costs the EU economy at least 120 billion euros per year.

Eurobarometer data shows that 68% of Europeans believe that corruption is prevalent in their country and over half of companies believe that corruption would be unlikely to be caught or reported.

To counter these challenges, the anti-bribery and corruption regime at EU level emanates primarily from Framework Decision 2003/568/JHA which aims to combat active and passive corruption in the private sector. As such, the Decision imposes the following duties on Member States to ensure that certain conduct, as described below, constitutes a criminal offence.

Article 2 states that the promising, offering, giving, requesting, receiving, or accepting an undue advantage of any kind is to constitute a criminal offence. This applies specifically to persons holding a position in a private-sector entity, both profit and non-profit. Furthermore, instigating, aiding and abetting the above conduct shall also constitute a criminal offence.

A primary aspect of this Framework Decision is the creation of a penalty and liability regime to effectively dissuade these offences. Article 4 states that Member States shall ensure that the above conduct is punishable by "effective, proportionate and dissuasive criminal penalties." Indeed, Article 4(2) prescribes a minimum sentence of at least one to three years imprisonment for crimes committed under Article 2. The possibility of temporary suspension from holding a senior position in a private company is outlined under Article 4(3).

Furthermore, Article 6 declares that each Member State shall introduce penalties for those held liable under Article 5(1), which may include criminal or non-criminal fines and other penalties such as:

- Exclusion from public benefit entitlements;
- Disqualification from commercial activities;
- Judicial supervision; or
- A judicial winding-up order.

The aforementioned Framework Decision represents the EU's primary apparatus to combat corruption in the private sector. However, in May 2023, the EU Commission described the current legal framework as "fragmented, outdated and limited in scope". For this reason, a proposed Directive on combating corruption was introduced in May 2023 which aims to expand the list of offences and expand upon the penalty regime. Furthermore, a primary objective of the proposal is to harmonize the approach across the EU to ensure certain offenses are punishable across Member States.

In relation to bribery and corruption in the private sector, the following provisions are primarily relevant:

Articles 7 and 8 concern bribery in the public and private sectors respectively. Similarly to Framework Decision 2003/568/JHA, the promise, offer, giving, request, or receipt of an undue advantage of any kind is to constitute a criminal offence.

Article 9(b) states that Member States shall make it an offence to commit, disburse, appropriate or use any property contrary to the purpose for which it was intended. Similar provisions are outlined under Articles 10 and 11 relating to gaining an undue advantage when trading in influence and abusing functions.

Penalties are outlined from Article 15. As stated above, the penalty regime is expanded upon. Once again, it is declared that Member States shall ensure that penalties are "effective, proportionate and dissuasive." In contrast to Framework Decision 2003/568/JHA, penalties for offences under Articles 7-14 are listed in considerable detail. The penalties include:

- Criminal offences listed under Articles 7-12 are punishable by a maximum term of at least six years imprisonment;
- Criminal offences listed under Articles 8-11 are punishable by a maximum term of at least five years imprisonment;
- The criminal offence referred to in Article 13 is punishable by a maximum term of at least four years imprisonment.

Additionally, if convicted of any crime under these Articles, Member States may introduce sanctions or measures, including: fines; disqualification from commercial activity; and withdrawal of authorization to pursue activities in the context of which the offence was committed.

Legal persons may also be held liable for criminal offenses according to Article 16. If held liable, applicable sanctions are outlined under Article 17.

Sanctions include:

- Criminal or non-criminal fines, the maximum limit of which should not be less than 5 percent of the total worldwide turnover of the legal person;
- Exclusion from public benefits;
- Exclusion from public procurement procedures;
- Disqualification from commercial activities;
- Withdrawal of permits to pursue activities in the context of which the offence was committed;
- Placing of the person under judicial supervision;
- Judicial winding-up of the person; and
- Closure of establishments used to commit the offence.

The Directive's jurisdiction will also be extended beyond EU boundaries. According to Article 20, jurisdiction shall be established by Member States where offenders are a national or have their habitual residence within the Member State or if the offence is committed for the benefit of a legal person established in the territory of that Member State.

In essence, the proposed Directive is an acknowledgement by the EU that the current framework surrounding corruption is no longer entirely fit for purpose following the emergence of greater legal threats due to corruption and the differing levels of enforcement across Member States.

The Commission is also clear that to effectively reduce corruption, "both preventive and repressive mechanisms are needed" according to the opening parts of the proposed Directive. The above provisions represent the repressive methods.

On the other hand, the Commission also identifies preventative measures. For example, Article 3 requires Member States to engage in awareness-raising campaigns whereby an assessment is carried out as to which sectors are most vulnerable to corruption and plans are then developed to raise awareness among the parties involved.

# 5.1 Whistleblower Protection Directive and Corporate Sustainability Reporting Directive

There are two additional EU Directives which compliment the EU's anti-corruption strategy: The Whistleblower Protection Directive (Directive (EU) 2019/1937) and the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) and its supplementary Sustainability Reporting Standards.

Firstly, whistleblower protection is a key component required to identify and bring focus on corruption. Indeed, the proposed combating corruption Directive provides for the protection of whistleblowers under Article 22. If criminal offenses as stated under Articles 7-14 of the proposed Directive are reported, then the Whistleblower Directive will automatically apply.

Like the proposed Directive on combating corruption, a central aim of the Whistleblower Directive is to harmonize the approach across the EU by declaring a minimum level of protection for whistleblowers in all Member States. Moreover, a wide spectrum of persons may qualify as whistleblowers, including part-time or self-employed workers, and even contractors and suppliers.

Of particular relevance are the following provisions of the Whistleblower Directive:

Article 8 establishes the obligation of private legal entities to create channels and procedures for internal reporting and follow-up. These channels and procedures shall allow employees to report information on criminal offenses. Article 9 specifies the internal procedures shall entail:

- Channels for receiving the reports which are designed, established and operated in a secure manner that ensures confidentiality;
- Acknowledgment of receipt of the report within seven days;
- The designation of an impartial person or department competent for following-up on the reports. The person or department shall maintain communication with the reporting person and, where necessary, ask for further information from and provide them with feedback;
- Diligent follow ups by the designated person or department or where provided by national law in relation to anonymous reporting;
- A reasonable timeframe to provide feedback which is defined as not exceeding three months from the acknowledgment of receipt or, if no acknowledgement was sent to the reporting person, three months from the expiry of the seven-day period after the report was made; and
- The provision of clear and easily accessible information regarding the procedures for reporting externally to competent authorities pursuant to Article 10.

Chapter V also contains provisions which are applicable to both internal and external reporting, including the protection of personal data in accordance with Regulation (EU) 2016/679, the duty of confidentiality, and record-keeping requirements.

Reports shall be stored for no longer than it is necessary and proportionate in order to comply with the requirements of the Directive.

Chapter VI contains protection measures, of which Article 19 is particularly relevant.

It lists forms of retaliation which are prohibited under the Directive such as suspension, dismissal, demotion, withholding of training, intimidation and discrimination, among many other forms of retaliation.

Overall, the Directive provides minimum standards for whistleblower protection and prescribes strong protection against retaliation for those reporting information.

However, a recent report states that transposition across the EU by many Member States has been late and the implementation of certain key provisions such as conditions for protection, protection against retaliation, exemptions from liability and penalties, is fractured across the EU.

Secondly, the Corporate Sustainability Reporting Directive (CSRD - Directive (EU) 2022/2464) includes requirements to report information under Articles 19a and 29a of Directive 2013/34/EU as amended by the CSRD.

The information to be reported shall be laid out by sustainability reporting standards. These standards are considered necessary to ensure harmonized sustainability reporting across the EU.

Accordingly, European Sustainability Reporting Standards were established. In particular, the European Sustainability Reporting Standard (G1 - Business Conduct) entered into force in December 2023.

This standard implements the CSRD and focuses on the reporting of business conduct matters, namely: corporate culture, including anti-corruption, anti-bribery, and the protection of whistleblowers; relationships with suppliers; and activities related to political influence, including lobbying.

This particular standard, G1 Business Conduct, is divided into numerous sections. Of particular relevance are the following sections:

- Disclosure Requirement G1-3 – Prevention and detection of corruption and bribery
- Disclosure Requirement G1-4 – Incidents of corruption or bribery

Under these disclosure requirements, it is required to provide information about internal procedures designed to prevent, detect, investigate and respond to allegations or incidents relating to corruption and bribery, including any relevant training. Additionally, information on incidents of corruption or bribery which happened during the reporting period are to be disclosed.

These reports fall under a determined scope and timeline. The following entities are subject to sustainability reporting under the CSRD:

- Public-interest entities with more than 500 employees (reporting obligations effective from financial year 2024; first report due in 2025);
- All large EU companies which, on their balance sheet dates, exceed at least two of the three following criteria: i) 250 employees on average during the financial year, ii) a total balance sheet above EUR 25 million and iii) EUR 50 million turnover; [reporting obligations effective from financial years beginning on or after 1 January 2025; first report due in 2026];
- SMEs admitted to trading on regulated markets (listed SMEs) [reporting obligations effective from financial years beginning on or after 1 January 2026 with first report due in 2027];
- Non-EU companies generating a net turnover of EUR 150 million in the EU and which have:
    - at least one subsidiary in the EU that follow the criteria applicable to large EU companies or listed SMEs; or
    - a branch in the EU generating more than EUR 40 million net turnover [reporting obligations effective from financial years beginning on or after 1 January 2028; first report due in 2029].

To conclude, this Standard established under the CSRD compels companies to provide information on a relatively wide range of governance issues, including items relating to corruption and bribery.

The intention of creating this mandatory reporting obligation is to make sustainability reporting akin to the reporting of financial information.

# 06. United Kingdom (UK)

In the UK, efforts to introduce regulations combating corruption and similar offenses have garnered momentum in recent years.

Before delving into these developments, it is first worth outlining the existing legislation, the Bribery Act of 2010. The Act was considered to be the most thorough anti-bribery law in Europe upon its enactment. It replaced offenses which existed under common law and older legislation, one of which dated back to the 19th century.

The most relevant provisions may be summarized as follows.

Sections 1-4 contain general bribery offenses:

- Section 1 states that it shall be an offense to offer, promise, or give an advantage, financial or otherwise, to another person presuming that the advantage is intended to induce a person to perform improperly a relevant function or activity or to reward a person for the improper performance of such a function or activity;
- Section 2 creates an offense against a person who is bribed. Numerous cases are listed as offenses whereby a person requests, agrees to receive or accepts a financial or other advantage for the improper performance of a function or activity;
- Section 3 lists functions in which bribery can take place as listed under Sections 1 and 2. The functions are:
    - any function of a public nature;
    - any activity connected with a business;
    - any activity performed in the course of a person's employment;
    - any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
- Section 4 defines the meaning of “improper performance” under the above sections. It is defined as performance which is performed in breach of a relevant expectation.

Section 6 concerns the bribery of foreign public officials. This offense only covers the offering, promising or giving of bribes, and not the acceptance of them. Section 6(5) defines a “foreign public official” as both persons who hold a government position and also those working for international organizations.

Of particular relevance is Section 7 which creates an offense if a commercial organization fails to prevent bribery.

A commercial organization is guilty if a person associated with the organization whilst intending to retain business or an advantage for the organization, engages in bribery.

It is however a defence for the organization to prove that it had adequate procedures in place to prevent persons from committing the bribery offense. This is determined under common law according to the balance of probabilities. This is perhaps an acknowledgement that it may be difficult to fully prevent bribery occurring within an organization.

In terms of jurisdiction, Section 12 states that it will extend to offenses committed outside the UK where the person committing them has a connection with the UK due to being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

This does not apply to Section 7 on the failure of a commercial organization to prevent bribery. Section 7(3) holds that a commercial organization can be liable under Section 1 or Section 6 on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. Additionally, under Section 12(5), it is stated that an offense can be committed under Section 7 irrespective of whether the offense takes place in the United Kingdom or elsewhere.

In terms of penalties, a person guilty under Section 1, 2, or 6 is liable to a ten year imprisonment term or an unlimited fine, or both. A person guilty under Section 7 is liable on conviction on indictment to a fine. These are harsh penalties designed to act as an effective deterrent.

A more recent development to anti-corruption law in the UK came in October 2023 with the enactment of the Economic Crime and Corporate Transparency Act.

The primary aim of the Act is to combat economic crime and support efforts to tackle terrorist financing, while also assisting legitimate business by facilitating the sharing of information between businesses in order to prevent and investigate economic crime.

Bribery is specifically included in the definition of economic crime under Schedule 11.

Of particular relevance are Sections 188 and 189 in relation to disclosures to prevent, detect, or investigate economic crime.

Firstly, Section 188 relates to direct disclosures of information. It removes any duty of confidence owed by a business to its customer, or any civil liability relating to a disclosure about that customer, where the business making the disclosure knows the identity of the recipient (a “direct disclosure”) and certain conditions are satisfied.

Secondly, Section 189 deals with indirect disclosures of information. It disapplies duties of confidentiality and civil liabilities where information is shared via a third-party intermediary who may hold information that could be relevant for preventing, detecting, or investigating economic crime, but it is not known specifically which businesses would benefit from the information.

The aim of the above provisions is to allow businesses to share information with each other in order to prevent economic crime (including bribery) by dismissing civil liability for breaches of confidentiality where information is shared for this purpose.

The Act will also likely be supplemented by draft regulations introduced in early 2024, which will provide for incidental provisions and penalties.

# 07. United States (Federal):

In 1977, the Congress of the United States enacted the U.S. *Foreign Corrupt Practices Act (FCPA or the Act)* as a reaction to widespread bribery of foreign officials by U.S. companies.

The Securities and Exchange Commission (SEC) discovered that more than 400 companies in the U.S. had paid hundreds of millions of dollars to foreign government officials in the form of bribes in order to secure business overseas. The SEC reported that these companies were using covert "slush funds" to make illegal campaign contributions in the U.S. and corrupt payments to foreign officials abroad. They were falsifying corporate financial records in order to conceal these payments. Passage of the FCPA was viewed as a vital and necessary step towards stopping corporate bribery, which had been tarnishing the image of U.S. businesses, impairing confidence of the public in the financial integrity of U.S. companies, and hindering the efficient functioning of the markets.

The intent of the Act was to put an end to those corrupt practices while creating a level playing field for honest businesses, and restoring the confidence the public once had in the integrity of the marketplace. Importantly, the FCPA contains both anti-bribery measures and accounting provisions.

The ***anti-bribery*** measures prohibit the following entities from making corrupt payments to foreign officials in order to obtain or retain business:

- U.S. individuals and businesses (domestic concerns);
- U.S. and foreign public companies listed on U.S. stock exchanges or that are required to file periodic reports with the Securities and Exchange Commission (SEC) (issuers); and
- Other specified foreign persons and businesses acting while in the U.S. territory (territorial jurisdiction).

The ***accounting provisions*** in the FCPA require issuers to make and keep books and records in an accurate manner and to create and maintain an adequate internal accounting controls system. These provisions prohibit individuals and businesses from purposely falsifying books and records or circumventing or failing to implement an adequate system of internal controls. The Department of Justice (DOJ), as well as the Securities and Exchange Commission (SEC), both have FCPA enforcement authority and they are both committed to combating foreign bribery through their joint enforcement efforts.

In addition to having a negative impact on society, corruption also has a negative effect on business. Corruption is anti-competitive and undermines the idea of a fair marketplace, leading to distorted prices and disadvantages for honest businesses that do not pay bribes.

It also adds to the cost of doing business internationally and increases the cost of government contracts in developing countries.

Additionally, corruption introduces significant uncertainty into business transactions since contracts that have been secured by means of bribery may be legally unenforceable. Paying bribes associated with one contract often results in corrupt officials making even more demands.

Bribery can also have destructive effects within a business by undermining employee confidence in the management of a company and fostering a permissive atmosphere for other kinds of corporate misconduct and corruption such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior. Companies that pay bribes in order to gain business ultimately undermine their own long-term interests, as well as undermine the best interests of their investors.

In 1988, Congress requested that President Bush negotiate an international treaty with members of the Organization for Economic Co-operation and Development (OECD) in order to prohibit bribery in any international business transactions with many of the United States' major trading partners. Negotiations resulting from this request led to the development of the *Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention)*, which mandated that parties make bribery of foreign officials a crime.

Ten years later, in 1998, the FCPA was amended in order to conform to the requirements of the Anti-Bribery Convention. The amendments expanded the focus of the FCPA to:

- Include payments made to secure "any improper advantage";
- Reach certain people from other countries who commit an act in furtherance of a foreign bribe during their time in the United States;
- Include public international organizations in the definition of "foreign official";
- Add an alternative basis for jurisdiction that is based on nationality; and
- Apply criminal penalties to foreign nationals who are employed by, or are acting as, agents of U.S. companies.

The aforementioned *Anti-Bribery Convention* came into force on February 15, 1999. The United States was a founding party.

In addition to FCPA, the U.S. Federal Bribery Statute (18 U.S.C. § 201) prohibits bribery of public officials and witnesses.

This statute applies to bribery of any person employed or acting on behalf of the U.S. government, as well as to anyone that has been appointed or nominated to fill any governmental position. It covers bribery that is designed to influence official behavior and illegal gratuities, which are something of value given as payback for an act completed by someone in an official capacity, or payments for the future expected favorable treatment.

Section 201's prohibition on illegal gratuities is quite similar to the prohibition on bribery that is intended to influence an official act.

It restricts gifts, offers, or promises of anything of value, either directly or indirectly, to a public official, former public official, or person who has been selected to be a public official, on account of an official act performed or to be performed by the public official.

Bribery and gratuities are distinguished from one another based on the following determination: *Bribery is completely future oriented, while gratuities can be either forward oriented or backward looking.*

# 08. Canada (Federal)

The Corruption of Foreign Public Officials Act (CFPOA) has been in force in Canada since 1999.

This federal legislation implements the Organization for Economic Co-operation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention)* and makes it a criminal offense to bribe a foreign public official.

Per this law, individuals, as well as corporations, can be prosecuted for offenses that are committed in both Canada and abroad.

Since October 2017, facilitation payments have also been included under the scope of the CFPOA. These are defined as payments made to foreign government officials in order to accelerate or facilitate routine transactions, such as permits.

The CFPOA reinforces Canada's role as an international leader in fighting corruption and promoting transparency in business practices, while also confirming the Canadian Government's commitment to the OECD Anti-Bribery Convention.

Canada advances responsible business conduct on a global basis through efforts to improve transparency and accountability in the extractive sector.

The *Extractive Sector Transparency Measures Act (ESTMA)* came into force in 2015 as a means to deliver on Canada's commitments to contribute to global efforts to increase transparency and deter corruption in that sector.

ESTMA mandates that certain businesses involved in the commercial development of oil, gas and minerals disclose the payments made to governments, both in Canada and abroad.

In addition, Canada's domestic anti-bribery provisions are part of the *Criminal Code, RSC 1985, c C-46. Sections 119 through 125*.

A number of bribery, corruption and "influence peddling" offenses, including the payment of bribes, benefits and advantages to domestic public officials in Canada, are included in this part of the Criminal Code.

All advantages granted to public officials in Canada are considered to be illegal if they were made in violation of the Criminal Code of Canada.

The Criminal Code considers the following to be offenses:

- Directly or indirectly giving or offering to give to an official a loan, reward, advantage or any kind of benefit as consideration for cooperation, assistance, exercise of influence, or an act or omission related to any transaction of business or any matter of business relating to the government, or a claim against the government, or any benefit that the government is authorized to bestow;
- Having any dealings with the government, paying a commission or reward to, or conferring an advantage or benefit of, any kind on an employee or government official in relation to those dealings, unless the head of the branch of government has given written consent; or
- Giving or offering to an official any kind of reward, advantage or benefit as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with a business transaction or any matter of business relating to the government, or a claim against the government, or any benefit that the government is entitled to bestow, or the appointment of any person to an office.

According to the Canadian Criminal Code, an “official” is a person who holds an office or is appointed or elected to discharge a public duty.

“Office” refers to any office or appointment under the government, a civil or military commission, and a position or employment in a public department.

# 09. References


- Canadian Corruption of Foreign Public Officials Act (CFPOA)
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- UK: Bribery Act, 2010
- UK: Prevention of Bribery in Commercial Organisations, Guidance Document, March 2011
- UK: Economic Crime and Corporate Transparency Act, 2023
- UK: Economic Crime and Corporate Transparency Act 2023 (Financial Penalty), Draft Regulations, March 2024
- UK: Economic Crime and Corporate Transparency Act 2023 (Consequential, Supplementary and Incidental Provisions) Regulations, Draft Statutory Instrument, February 2024
- United Nations Convention against Corruption (UNCAC)
- United Nations Global Compact Guide to Corporate Sustainability
- United Nations Global Compact
- U.S. Federal Bribery Statute (18 U.S.C. § 201)
- U.S. Foreign Corrupt Practices Act (FCPA)

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