

STANDARD GUIDANCE

(COP 9) Bribery and Facilitation Payments

A. Definitions and applicability

Bribery means the offering, promising or giving, as well as demanding or accepting of any undue advantage, whether directly or indirectly, to or from:

- a public or government official (politically exposed persons);
- a political candidate, party or official; or
- any private sector employees, directors or officers (including a person who directs or works for a private sector enterprise in any capacity) or their agents or representatives.

Facilitation payments are paid to receive preferential treatment for something that the payment receiver is otherwise still required to do.

Source:

- *United Kingdom Bribery Act (2010)*
www.thebriberyact2010.co.uk/what-is-a-bribe.asp
- *RJC Code of Practices (2013)*

The **Bribery and Facilitation Payments** section of the COP is applicable to all Members.

B. Issue background

Two decades ago, bribes were a tax deductible business expense in many countries. In the early 1990s, non-government organisations began international campaigns against corruption. It became recognised that corruption – an abuse of entrusted power for private gain – hinders economic development, corrodes the fabric of society, and distorts national and international trade. Corruption can also undermine environmental and labour standards, access to human rights and the rule of law.

Bribery is the most widely condemned form of corruption. Today, nearly all countries have criminalised bribery where it occurs domestically. In many countries it can be prosecuted even where the offence takes place overseas. Bribes may take the form of cash, gifts in kind, hospitality, expenses, advantage or promises. In some cases, the briber holds a powerful role and controls the transaction. In other cases, a bribe may be effectively extracted from the person paying.

Facilitation payments have historically attracted a more mixed response. In countries where wages are low or gift-giving is intrinsic to relationships, facilitation payments emerged as more or less acceptable. However, making a clear distinction between a facilitation payment and a bribe can be difficult in practice. For this reason, facilitation payments are often treated as equal to bribes and prohibited in anti-corruption initiatives.

Businesses are increasingly taking a strong stand against corruption. Investor confidence and the reputations of some sectors have been eroded by business ethics scandals. Corruption is now understood to add a financial burden to business. The UN Global Compact estimates that 10% or more can be added to the costs of doing business in some parts of the world. A consensus is emerging that corruption and bribery damage company integrity, degrade the business environment and fail to create competitive advantage.

C. Key regulations

International standards

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) was the first international instrument to fight corruption in cross-border business deals. It has since

been ratified by all 34 OECD countries and six non-member countries. National governments and businesses have used the Convention to improve legislation and raise standards. Bribing a foreign official is now a criminal offence in all signatory countries.

Transparency International, a non-government organisation, introduced the Business Principles for Countering Bribery in 2002. These principles aim to provide a model for companies to implement a comprehensive anti-bribery program. The approach ranges from internal policies and practices to how to deal with business partners and the supply chain. The Principles are intended for use by companies of all sizes.

The United Nations (UN) adopted its Convention against Corruption for ratifying states in 2003. It was the first legally binding, international anti-corruption instrument. This paved the way for the 10th Principle against corruption to be added to the UN Global Compact in 2004.

National law

In most jurisdictions, any form of bribery is illegal. In some countries however, facilitation payments are customary to conduct business and personal activities, and may even be legal. It is essential to be fully informed of all relevant legislation and regulations in every jurisdiction of operation.

UK Bribery Act

In 2010, the UK Bribery Act was enacted to update and enhance UK law on bribery including foreign bribery in order to address better the requirements of the 1997 OECD Anti-Bribery Convention. It is now among the strictest legislation internationally on bribery. The UK Bribery Act (which entered into force on 1 July 2011) has important implications for companies registered in the UK and foreign companies doing business in the UK.

The Bribery Act creates four prime offences:

- Two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage;
- A discrete offence of bribery of a foreign public official; and
- A new offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage (should an offence be committed, it will be a defence that the organisation has adequate procedures in place to prevent bribery).

D. Suggested implementation approach

- **COP 9.1: Policy:** *Members shall establish policy/ies that: a) Prohibit Bribery in all business practices and transactions carried out by the Member and by agents acting on behalf of the Member; b) Protect Employees from any penalty or adverse consequences for identifying in good faith concerns related to suspected Bribery, or for refusing to participate in Bribery or pay a Facilitation Payment where Facilitation Payments are prohibited, even if this action may result in the enterprise losing business; c) Set the criteria and approval procedures to be followed by Employees in respect of the offer and/or acceptance of gifts with third parties.*

Points to consider:

- A senior manager should have designated operational responsibility for anti-corruption programs.
- A policy/ies in conformance with the RJC's COP requirements on **Bribery and Facilitation Payments** should be formally established and clearly endorsed by the highest level of the business.
- The policy/ies should be communicated to all employees and any party who may act as an agent on behalf of the Member, and referenced in appropriate contract documents.
- Training should be provided to ensure the policy/ies is understood by relevant employees, agents and contractors, particularly if the policy/ies is new or has been significantly changed.
- The policy/ies should seek to establish awareness of corruption issues and risks, and provide the foundation for embedding an anti-corruption culture in the organisation.
- The policy/ies should include sanctions for non-compliance.

- Members should consider establishing a contact person or office to provide advice and receive complaints or concerns about compliance with the Member's policy/ies. For larger companies where significant risks are identified, the policy/ies should consider providing employees and agents with access to a whistleblowing mechanism.
 - The policy/ies should address political donations, charitable (and similar or equivalent) contributions and sponsorships.
 - Criteria and procedures for the recording and approval of the offer and acceptance of third party gifts, including hospitality and entertainment, should be clear and practical and communicated to employees and relevant agents and contractors. Judgment may be needed to set the criteria of acceptable thresholds, in the context of customary exchanges vs the risk of corruption.
 - Members should ensure they are aware of the Applicable Law, including the extraterritorial reach of some countries' legislation. If uncertain, advice should be sought from qualified legal advisors.
- **COP 9.2: Systems:** *Members shall have systems in place to manage Bribery Risk in their organization. The systems shall include: a) Identification and monitoring of those parts of the Member's business that pose high Risks of participation in Bribery; b) Recording of relevant gifts to and from third parties in a gift register, as per the Member's policy; c) Investigation of any incidences of suspected Bribery within their organisation; d) Sanctions for Bribery and attempted Bribery.*

Points to consider:

- Members should conduct a risk assessment to identify those parts of the business that are exposed to bribery risk. Consider seeking professional expertise to assist, particularly for complex business operating in multiple locations. **See the RJC Risk Assessment Toolkit for a general risk assessment template that can be used, particularly for small to medium enterprises.** Alternatively Members may use their own risk assessment process.
 - Risks may vary depending on the type of business and geographical location, but can frequently involve individuals in a position to influence (or be influenced) in respect of transactions or business relationships with third parties, including government entities (and entities in which government or public officials have interests).
 - The risk assessment should identify relevant types of risk, based on the nature of the business, and distinguish between different parts of the business according to their level of risk, such that anti-corruption programs, controls, training and monitoring can concentrate on areas of greatest risk.
 - A documented anti-corruption program should be established to mitigate identified risks, such as through the provision of training, formal approval procedures that avoid concentration of authority with single individuals, enhanced oversight of higher-risk transactions, use of documented selection criteria supported by due diligence for the selection of new agents and relevant contractors, incorporation of appropriate anti-corruption compliance provisions in contract documents, and recording of any instances of attempted bribery and their investigation.
 - A third party gift register should be established, and used to record given, received and accepted gifts, as identified by the criteria set under provision 9.1. Gifts include major charitable contributions, sponsorships, or community payments, and significant hospitality expenses that are offered in commercial circumstances with bribery risks. A gift register does not need to be stand-alone and could be integrated within a Member's payment system, for example.
 - Compliance with the anti-corruption program should be reviewed periodically by competent personnel who are free of conflict of interest.
 - Monitoring arrangements should be appropriate to the business' circumstances and may incorporate financial analysis, interviews, testing of approvals, and training that raises awareness of 'red flags'.
- **COP 9.3: Facilitation Payments:** *Where Facilitation Payments are permitted by Applicable Law, Members shall: a) Undertake actions to eliminate all Facilitation Payments, or to reduce the size and frequency of Facilitation Payments over time; b) Ensure that any Facilitation Payments are of limited nature and scope; c) Implement controls to monitor, oversee and fully account for any Facilitation Payments made by or on behalf of the Member.*

Points to consider:

- Members should be aware of the Applicable Law regarding facilitation payments. Where facilitation payments are not permitted by Applicable Law, they must be addressed under the bribery-related provisions above.
- Policy/ies should include clear and practical guidance on acceptable and unacceptable facilitation payments, tailored where appropriate to location. Where facilitation payments are not permitted by law, or by the Member's own anti-bribery program, they do not need to be separately distinguished in the Member's policy/ies.
- The policy/ies should provide for approval requirements under the authority of a responsible manager.
- All facilitation payments should be fully accounted for and recorded, such as in a register.
- Consideration should be given to informing those external parties who receive facilitation payments about the Member's policy/ies that limit their nature and scope.
- The implications and consequences of reduced facilitation payments should be monitored, with a view to identifying payments that could be reduced or eliminated.

Check:

- ✓ Do you know the Applicable Law regarding bribery and facilitation payments?
- ✓ Have you established an anti-bribery policy and communicated it to employees and agents?
- ✓ Can you show the auditor your supporting systems, such as a risk assessment, a gift register and procedures for investigation and sanctions?
- ✓ Do you have appropriate controls over facilitation payments, where permitted and if you make them, with the intent to reduce and eliminate them over time?

E. Further information

The following websites have further information on bribery and corruption issues:

- Transparency International
www.transparency.org.uk/our-work/bribery-act
- Transparency International – Adequate Procedures – Guidance to the UK Bribery Act 2010
www.transparency.org.uk/our-work/publications/10-publications/95-adequate-procedures-guidance-to-the-uk-bribery-act-2010
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html
- PwC - UK Bribery Act: the British act against corruption is not something that Belgian business can just ignore (2011)
www.pwc.be/en/press/2011-08-30-british-act-against-corruption.jhtml
- Publish What You Pay
www.publishwhatyoupay.org
- United Kingdom Bribery Act (2010)
www.thebriberyact2010.co.uk/default.asp
- United Nations (UN) Global Compact – Principle 10 on Anti-Corruption (2004)
www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html
- United Nations Office on Drugs and Crime (UNODC) - Action against Corruption and Economic Crime
www.unodc.org/unodc/en/corruption/index.html
- World Economic Forum – Partnering Against Corruption Initiative
www.weforum.org/en/initiatives/paci/index.htm