

## ARNOLD &amp; PORTER (UK) LLP

ADVISORY

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## UK Government Issues Guidance on the Bribery Act

The Ministry of Justice in the United Kingdom has issued its eagerly awaited guidance on the Bribery Act 2010 (the Act). The guidance, and the coming into force of the Act itself, were delayed while the Ministry of Justice took further soundings from businesses operating in the United Kingdom to “ensure the Act is implemented in a workable way - especially for small firms that have limited resources.”<sup>1</sup> The representations made by business seem to have made an impact. The guidance, which goes beyond what was actually required to be published and extends to some important matters of general interpretation, could significantly reduce the impact of the Act, particularly on non-UK incorporated businesses.

Our previous Advisories<sup>2</sup> set out the general scheme of the Act and the statutory definitions of the new offences of “bribing another person,” “bribery of a foreign official,” and “failure of commercial organisations to prevent bribery” (the Section 7 offence). In summary, Sections 1 and 2 of the Act restate and redefine the existing offences of bribing another person and accepting a bribe. They apply to acts of bribery in both the public and private sector. The offences require proof of an intention to induce a person to perform or reward him for performing a relevant function improperly. Section 6 of the Act provides that it will also be an offence for a person to bribe a foreign public official with the intention of influencing him in his capacity as the foreign public official. The Act creates a new offence under Section 7 that can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. The guidance adds some useful clarification to the Act, whilst making it clear that the examples and illustrations that it contains are neither exhaustive nor prescriptive. The full guidance is *available at*: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>.

<sup>1</sup> Foreword to the Guidance by Kenneth Clarke, the Secretary of State for Justice

<sup>2</sup> See: Arnold & Porter LLP “Advisory: UK Government Announces Timing For Implementation of the Bribery Act 2010,” (August 2010) *available at*: [http://www.arnoldporter.com/public\\_document.cfm?id=16402&key=15C2](http://www.arnoldporter.com/public_document.cfm?id=16402&key=15C2), and “Advisory: UK Bribery Act 2010: An In-depth Analysis,” (May 2010) *available at*: [http://www.arnoldporter.com/public\\_document.cfm?id=15833&key=23D1](http://www.arnoldporter.com/public_document.cfm?id=15833&key=23D1).

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The guidance is carefully caveated to emphasise that, in relation to matters of general interpretation of the Act, the courts will be the final arbiter when considering particular facts and circumstances before them in what may turn out to be test cases. Constitutionally speaking, the courts have no reason to be interested in the opinion of the government of the day as to the meaning of any law; the courts are there to determine the will of Parliament in passing the Act. It is clear, nevertheless, that the guidance will strongly influence the decisions that the Serious Fraud Office (SFO) will have to make on whether or not to prosecute in any given case. If the guidance is followed by the SFO, the cases that come before the courts will reflect the SFO's prosecutorial discretion and the courts themselves might never have a chance to analyse some parts of the Act. The SFO's positions may, of course, change over time if the government or the personalities at the SFO change.

## THE HEADLINES ARE:

### Coming into Force

- The Act will come into force on 1 July 2011.

### Jurisdiction

- Organisations that do not have a demonstrable business presence in the United Kingdom should not be within the scope of a Section 7 offence. The fact that a company's securities are on the UK Listing Authority's Official List and therefore eligible to be traded on the London Stock Exchange will not, in itself, constitute "carrying on a business or a part of the business in the United Kingdom" for the purposes of Section 7.
- According to the guidance, having a UK subsidiary will not, in itself, mean that a parent company is "carrying on a business in the United Kingdom."

### Foreign Public Officials

- The guidance confirms that the definition of a "foreign public official," includes any person who performs public functions in any branch of the national, local, or municipal government in a country or territory or who exercises a public function for any public agency or public enterprise, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. It appears, therefore, that mere employees of state-owned enterprises, for example a national health service or a utility company, will not be captured

by the definition of "foreign public official" where, rather than exercising a public function, they are engaged in ordinary, commercial, or professional activities. This is in contrast to the position that the US authorities take in FCPA cases.

- Where the law of a particular country is silent as to whether an official is permitted or required to be influenced by an offer of an advantage, prosecutors will consider the public interest in prosecuting.

### Adequate Procedures

- The "adequate procedures" that will found a defence to the Section 7 offence of failure of a commercial organisation to prevent bribery are likely to be different for a small- and medium-sized organisation from those that might be right for a large multinational organisation. Overall, the key message is that the procedures should be proportionate to the risk of bribery. The factors that are to be considered in assessing whether procedures are adequate are discussed in more detail below.

### Hospitality

- Organisations can provide bona fide hospitality and can incur promotional or other business expenditure that is reasonable and proportionate. By way of example, the guidance indicates that:
  - An invitation to foreign clients to attend international sporting events, such as Six Nations rugby at Twickenham, tennis at Wimbledon, or a motor racing Grand Prix, as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field of business, is unlikely to engage the Section 1 offence of "bribing another person," and, by implication, the Section 6 offence of "bribery of a foreign public official."
  - The provision of airport-to-hotel transfer services to facilitate an on-site visit, or dining and tickets to an event such as a baseball game, are unlikely to raise the inference that a foreign public official was intended to be influenced thereby.
  - The provision of a five-star holiday to a foreign public official, unrelated to the demonstration of an organisation's services is, on the other hand, far more likely to raise an inference that the official was intended to be influenced.

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- Organisations pursuing primarily charitable or educational aims or purely public functions will be caught by the Section 7 offence if they engage in commercial activities, irrespective of the purpose for which profits are made.
- The guidance suggests that the provision of hospitality for foreign public officials should be cleared with the relevant public body.

## Associated Persons

- A relevant commercial organisation may commit the offence of failing to prevent bribery if an “associated” person bribes another intending to obtain or retain business or an advantage in the conduct of business for the commercial organisation. An “associated” person is a person who performs “services” for an organisation. The guidance concludes that a supplier who merely acts as the seller of goods to a commercial organisation is not an “associated” person.
- The guidance suggests that only a direct contractual counterparty will be deemed to be performing services for a commercial organisation and will, therefore, qualify as an “associated” person for the purposes of Section 7. Other third parties with whom that counterparty may be in contract will most likely only qualify as persons “associated” with the counterparty and not persons “associated” with the commercial organisation in question, although the circumstances of each case will need to be examined carefully.

## Joint Ventures

- According to the guidance, the existence of a joint venture operating through a separate legal entity will not, in itself, mean that it is associated with any of its members for the purposes of the Section 7 offence. Therefore, a payment by an employee or agent of a joint venture will not necessarily trigger liability for members of the joint venture simply because they benefit indirectly through their investment or ownership of the joint venture.
- Where a joint venture is conducted through a contractual arrangement, the degree of control that a participant has over the arrangement is likely to be one of the relevant circumstances to be taken into account in deciding whether a joint venture employee or agent who made

the payment was performing services for or on behalf of a participant in the arrangement.

## Subsidiaries

- The fact that an organisation benefits indirectly from a bribe is unlikely, in itself, to constitute sufficient proof of the specific intention to obtain or retain business or an advantage in the conduct of business for an organisation required by the Section 7 offence. Liability will not accrue through simple corporate ownership or investment, the payment of dividends, or the provision of loans by a subsidiary to its parent. A bribe offered or paid on behalf of a subsidiary by one of its employees or agents will not, therefore, automatically involve liability on the part of its parent company, or by any other subsidiaries of the parent company, merely because the parent or other subsidiaries benefit indirectly through the relevant corporate structure.

## Facilitation Payments

- As was the case under the old law, the Act does not provide an exemption for facilitation payments.
- The guidance notes that the common law defence of duress is very likely to be available as a potential defence where facilitation payments are paid in order to protect against the loss of life, limb, or liberty.

## Prosecutorial Discretion

- The objective of the Act is not to bring the full force of the criminal law to bear upon well-run commercial organisations that experience an isolated incident of bribery on their behalf.
- Where hospitality, commercial expenditure, or facilitation payments on their face violate the provisions of the Act, prosecutors will consider very carefully whether it is in the public interest to prosecute.

A commercial organisation’s willingness to co-operate with an investigation and to make full disclosure will be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

## Public Procurement

- Although not a matter for the guidance, the Secretary of State told the House of Commons, when announcing the date on which the Act would enter into force, that the government would be bringing forward amendments to the relevant public procurement regulations which will

provide that a conviction for an offence under Section 7 of the Act would lead to discretionary rather than mandatory debarment from all public contracts.

### **GUIDANCE ON “ADEQUATE PROCEDURES”**

The guidance on procedures that are likely to be considered adequate to found a full defence for a commercial organisation potentially exposed to the Section 7 offence of failing to prevent bribery is very familiar. The principles differ very little from the illustrated principles contained in the draft guidance published by the Ministry of Justice in November 2010. The guidance also largely reflects the principles set out in documents published by anti-corruption non-governmental organisations such as Transparency International.

The principles are not prescriptive. They are intended “to be flexible and outcome focused, allowing for the huge variety of circumstances that commercial organisations find themselves in”.<sup>3</sup> A company may be able to demonstrate that its procedures are adequate to prevent bribery by adopting alternative approaches, but active and appropriate adherence to the six principles is likely to satisfy a court (and, therefore, a prosecutor in weighing up the public interest in prosecuting) that a full defence to the Section 7 offence can be made out. In such circumstances, since the SFO must take the guidance into account in considering a prosecution, it seems unlikely that cases where companies have adopted and effectively implemented the principles will ever reach the courts.

#### **Principle 1—Proportionate Procedures**

The guidance reiterates that a commercial organisation’s procedures to prevent bribery by associated persons should be proportionate to the bribery risk it faces and to the nature, scale, and complexity of the commercial organisation’s activities, and should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. They should also be clear, practical, accessible, effectively implemented, and enforced.

The guidance includes an illustrative, but not exhaustive, list of topics that bribery prevention procedures might embrace. These include policies and procedures relating to:

- the involvement of the organisation’s top-level management;

- risk assessment procedures;
- due diligence of existing or prospective associated persons;
- the provision of gifts, hospitality, promotional expenditure, charitable and political donations, or demands for facilitation payments;
- direct and indirect employment, including recruitment, terms and conditions, disciplinary action, remuneration, and governance of business relationships with associated persons;
- financial and commercial controls such as adequate bookkeeping, auditing, and approval;
- the transparency of transactions and disclosing of information;
- decision making, such as delegation of authority procedures, separation of functions, and the avoidance of conflicts of interest;
- enforcement, including disciplinary procedures and sanctions for breach of the organisation’s anti-bribery rules;
- reporting bribery, including “speak up” or “whistleblowing” procedures;
- the detail of the process to implement bribery prevention procedures;
- the communication of the organisation’s policies and procedures and training in their application; and
- the monitoring, reviewing, and evaluation of bribery prevention procedures.

#### **Principle 2—Top-level Commitment**

The senior management of the commercial organisation should be committed to preventing bribery by associated persons. Management should foster a culture within the organisation in which bribery is never acceptable.

The guidance specifically encourages management to make its views known by issuing formal statements (e.g., within the code of conduct, as well as on intranet or internet sites) setting out the organisation’s commitment to establishing an anti-bribery culture. The guidance suggests that such statements include: (a) a commitment towards “zero tolerance” of bribery; (b) a description of the consequences of breaching the policy for employees and managers; and (c) identification of the key individuals and departments involved in the development and implementation of the

<sup>3</sup> Guidance by Kenneth Clarke, the Secretary of State for Justice, 20.



organisation's bribery procedures. Businesses are also encouraged to include a reference in such statements to the organisation's involvement in any collective action against bribery, for example, in the same business sector.

Effective leadership in bribery prevention should be appropriate and proportionate to the organisation's size and management structure. Top-level management commitment is required, although in practice anti-bribery work is likely to be led by senior managers who can demonstrate engagement with relevant associated persons and external bodies as well as specific involvement in high-profile and critical decision making. In a multinational organisation, the board should be responsible for setting overall bribery prevention policies, monitoring their implementation, and keeping these procedures under review.

### **Principle 3—Risk Assessment**

A commercial organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery on behalf of associated persons at regular intervals. The risk assessment procedure should be overseen by senior management and appropriately resourced. Risk assessments and their conclusions should be documented, as should due diligence enquiries.

A risk assessment procedure should consider:

- country risk;
- sectoral risk;
- transaction risk;
- business opportunity risk; and
- business partnership risk.

An assessment of external bribery risks is likely to include: (a) an assessment of whether the organisation's own internal structures and procedures may increase the risk, such as through identification of any deficiencies in employee training, skills, and knowledge; (b) whether there is a salary or bonus culture that rewards excessive risk taking; (c) whether there is a lack of clarity in the organisation's policies on hospitality and promotional expenditure; (d) whether financial controls are clear; and (e) whether the top-level management in each associated person is sending out a clear anti-bribery message.

### **Principle 4—Due Diligence**

The commercial organisation should apply due diligence

procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks. The guidance emphasises throughout that due diligence procedures should be proportionate to the identified risk. The guidance suggests, for example, that the appropriate level of due diligence required by a commercial organisation contracting for an information technology service may be low because there are lesser risks of bribery in this type of contract. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets typically will require a much higher level of due diligence to mitigate the greater risks of bribery on its behalf.

The sort of due diligence that might be undertaken includes conducting direct or indirect inquiries, investigations, or general research on proposed associated persons. This might involve requesting that the vendor provide details on the background, expertise, and business experience of relevant individuals, followed by verification of this information through research and following up with references.

### **Principle 5—Communication (including Training)**

The commercial organisation should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

The content, tone, and language of communication for internal consumption may vary from that for external use in response to the different relationship the commercial organisation has with this audience.

Internal communications should convey the "tone from the top" from senior management and focus on the implementation of the organisation's policies and procedures, as well as the implications for employees. The guidance commends "speak up" procedures which allow secure, confidential, and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons and to provide suggestions for improvement of bribery prevention procedures and controls and suggestions for requesting advice.

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General training on the threats posed by bribery and the organisation's procedures in relation to that threat should be mandatory for new employees or agents. Effective training should be continuous and regularly monitored and evaluated. The guidance also suggests that organisations may wish to encourage associated persons, that is persons other than employees, to adopt bribery prevention training. E-learning and web-based tools are likely to be as acceptable as traditional classroom training formats.

## Principle 6—Monitoring and Review

The commercial organisation should monitor and review procedures designed to prevent bribery by associated persons and make improvements where necessary.

In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery, or negative press reports. Staff surveys, questionnaires, and feedback from training can also provide an important source of information and a means by which employees and other associated persons can help to improve anti-bribery policies.

The guidance proposes that organisations could also consider formal periodic reviews and reports for senior management, including drawing on information from relevant trade bodies or regulators. Finally, the guidance suggests that organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures bearing in mind that any such external verification will not be a guarantee that a commercial organisation's bribery prevention procedures are "adequate".

## JOINT GUIDANCE FOR PROSECUTORS

The Director of the SFO and the Director of Public Prosecutions have also issued joint prosecution guidance on the Bribery Act 2010, which is *available at*: [http://www.cps.gov.uk/legal/a\\_to\\_c/bribery\\_act\\_2010/index.html](http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html). This guidance adds little to the guidance on the interpretation of the Act contained in the Ministry of Justice guidance beyond making it clear that prosecutors should follow a two-stage test in deciding whether to mount a prosecution under the Act. A prosecutor must be satisfied first that a case passes an evidential test and, secondly, that it passes

a public interest test. A prosecutor must be satisfied first that there is sufficient evidence to prove the offence beyond a reasonable doubt. A case which does not pass this test will not be prosecuted no matter how sensitive or high-profile the matter is. For any case that passes the evidential test, a prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

According to the prosecutor's guidance, some factors which tend in favour of the prosecution are:

- a conviction for bribery is likely to attract a significant sentence;
- the offences are premeditated and include an element of corruption of the person bribed;
- the offences are committed in order to facilitate more serious crimes; and
- those involved in bribery are in positions of authority or trust and took advantage of that position.

Factors tending against prosecution include cases where:

- the court is likely to propose only a nominal penalty;
- the harm can be described as minor and was the result of a single incident; and
- there has been a genuinely proactive approach involving self-reporting and remedial action.

In relation to facilitation payments, the prosecutor's guidance suggests that it would be a factor tending in favour of prosecution where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed. Conversely, if an organisation does have such a clear policy and it has been correctly followed, this will be a factor tending against prosecution even if an act of bribery has resulted.

## CONCLUSION

Companies now have three months to fine tune their anti-bribery policies and procedures to ensure they are appropriate, effective, and therefore, adequate. The Guidance has provided a welcome reprieve for properly focused corporate hospitality and has answered some of the questions posed by overseas businesses as to how

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the Act will affect them. The first cases to reach the courts under the Act will be followed with great interest by the UK business community and, possibly after consideration by the appeal courts, should fill in some of the gaps in the interpretation of the Act left open by the guidance.

*We hope that you have found this Advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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