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# Bribery Act to Come into Force on 1st July 2011

### Introduction

The release on Wednesday 30 March of Government guidance for the Bribery Act marks the start of a three month count down to the Act coming into force on 1st July 2011.

From that date it will be an offence for companies to fail to prevent bribery. The penalties for bribery are high, an unlimited fine and the possibility of exclusion from all public contracts across Europe for organisations and up to 10 years in prison for individuals, as well as striking off for Directors. The SFO has this week said that it will "enforce the Act vigorously" and that enforcement of the Act will be a "high priority" for prosecutors.

The Bribery Act was given Royal Assent in April 2010, but enforcement was delayed to allow a public consultation and preparation of government guidance. On the one hand, the Government has been lobbied heavily by businesses concerned about vague and overly strict provisions that might disadvantage UK companies. On the other hand, the Government has been harangued by international bodies and other countries, who criticise the UK for failing to take corruption seriously. The delay in enforcement of the Act resulted in renewed criticism and the pressure was mounting on the Government to 'get on with it'.

A number of specific issues had been causing businesses concern and there had been suggestions the Government might water down some of the provisions. Kenneth Clark, the Secretary of State for Justice, has confirmed that the provisions of the Act will not be altered and all the guidance is intended to do is assist organisations, particularly smaller organisations, in interpreting and responding to the Act. However, the guidance does provide some additional clarification, which may affect how it is implemented in practice, making it essential reading for all organisations doing business in the UK.

## The Guidance Sheds a Little Light:

### Adequate procedures

The Act makes it an offence for an organisation to fail to prevent bribery being carried out on its behalf. It is a defence to that charge that the organisation had in place "adequate procedures" to prevent bribery. The guidance confirms that what policies and procedures are required for this defence depends on the particular organisation. They are to be proportionate to the level of risk an individual business faces.

Businesses will need to assess their risk, by considering factors such as (i) the industry it works in, (iii) the territories it operates within, and (iii) the business model it adopts. For example, a business whose industry is not considered high risk (so not pharmaceuticals, oil & gas, construction etc), which operates exclusively in Scotland or the UK and which does not use third party agents/partners/contractors, is likely to have a low overall risk profile and therefore will be able to put in place fairly low key policies and procedures. On the other hand, businesses who tick one or more of the high risk boxes will be expected to put in place more sophisticated policies and procedures, with more thorough reviews and checks.

Following the principles set out in the guidance:

1 **Proportionate Procedures**: proportionate policies and procedures should be put in place, which are clear, practical, accessible and enforced

2 **Top-Level Commitment**: organisations should ensure that there is top level commitment to bribery prevention within their organisation, and that they encourage a culture in which bribery is never acceptable

3 **Risk Assessment**: every business should carry out a risk assessment, whether this is an internal assessment or one involving an external advisor, to determine the level of risk their particular organisation is exposed to

4 **Due Diligence**: where appropriate, businesses should ensure that due diligence is conducted to screen any business associates and mitigate any bribery risks

5 **Communication (including training):** the policies and procedures should be embedded and understood throughout the organisation, with appropriate communication and training provided

### Hospitality

Businesses had been concerned that the Act might be the death knell of corporate hospitality. However, Mr Clark noted that it is not the government's intention to criminalise "bona fide" hospitality, which is recognised as an established and important part of doing business. The guidance confirms that "reasonable and proportionate" promotional activities will not fall foul of the law. Concerns that the Act made the provision of *any* hospitality an offence have therefore been addressed. However, businesses will still have to make judgement calls on whether or not a particular business development expenditure is reasonable and proportionate in the particular circumstances.

In making that judgement it is important to note that for anything to constitute bribery under the Act there must have been the giving or receiving of a financial or other advantage *and* it must be given with the intent to induce someone to behave improperly. A prosecutor is going to have to prove the advantage was given with that intention, which will be very difficult to do where the expenditure is not beyond the norm in that particular area of business. Viewed like that, judgement calls becomes a bit easier.

### Associated Persons

The Act makes it an offence for a company to fail to prevent bribery by any associated person carrying out services on its behalf. The definition of "associated person" is drafted very broadly, potentially covering joint venture partners, sub-contractors, agents and suppliers. There were concerns that businesses may be penalised for bribery carried out by individuals or organisations which were many steps removed and over which they had little or no control, placing a considerable burden on organisations to carry out extensive due diligence on business associates, potentially all the way through a chain of supply.

The guidance makes it clear that the degree of control an organisation has over a business associate will be a relevant factor in deciding if the associate was performing services on its behalf. The associate must also be shown to have intended to obtain or retain a business advantage for the organisation. Joint venture members will not necessarily be liable for bribes paid on behalf of another joint venture member, even where they benefit indirectly from that bribe. Similarly, a parent company will not necessarily be liable for bribes paid by employees or agents of a subsidiary.

This will go some way to addressing the concerns of organisations with this type of business model.

### Grease Payments

The UK Bribery Act does not allow any facilitation or grease payment, payments made to public officials in order to expedite the performance of a routine function, unless it is specifically permitted in the written law of the country of the foreign official. Organisations operating in countries where such payments are ingrained in the culture are concerned that this will leave them at a considerable disadvantage, for example, compared to companies operating under the US legislation, which carves out small payments to foreign officials for carrying out their normal activities.

A lot of pressure has been put on the UK government to allow a similar carve out, but it has now been confirmed that no such carve out will be made. The UK will therefore be one of the first OECD member countries to impose a blanket ban on facilitation payments.

However, guidance for prosecutors issued this week by the Director of Public Prosecutions (DPP) indicates that prosecutors in England & Wales will take into account (1) whether the payment was a small one-off payment, (2) if they were self-reported and corrective action taken, (3) if the business has a clear and appropriate policy in relation to facilitation payments which has not been followed, and (4) if the payer was in a vulnerable position when the payment was made. It is therefore far more likely that businesses making facilitation payments as a matter of course, without any effort to prevent this, will be prosecuted, than those uncovering a one off instance by a renegade employee or agent.

### Non-UK Organisations

Under the Act, any organisation doing business in the UK can be prosecuted here for bribery committed here or abroad. This had caused concern that companies might be prosecuted here for an act of bribery otherwise completely unconnected with the UK if, for example, the company benefiting from the bribe had a subsidiary here or was listed here.

The guidance indicates that in deciding if an organisation is "doing business" here prosecutors and the courts should consider whether or not the organisation has a "demonstrable business presence" in the UK. Therefore the mere fact that it has a subsidiary here or some other business connection may not be enough. However, the SFO has indicated that it will interpret this broadly in appropriate cases. Just how this plays out will ultimately be determined when the courts have had the opportunity to apply the Act to specific cases.

### Prosecutions: Scotland Left in the Dark

What the status of this guidance is in Scotland remains unclear. In the guidance it is said that cases will be brought where they are in the public interest, and prosecutions will require the agreement of the Director of Public Prosecutions (DPP) or the Director of the SFO. However, neither of these bodies have any jurisdiction in Scotland. In Scotland investigations and prosecutions are carried out by the police and the Crown Office. The guidance gives no indication as to what, if any, controls will be in place in terms of Scottish prosecutions.

DPP has noted that the guidance it has issued for prosecutors in England and Wales "will enable prosecutors to adopt a consistent approach to decision making across the whole range of bribery cases." No equivalent guidance has been issued by the Crown Office.

In England and Wales the SFO encourages organisations to self-report if they uncover suspicious activity. The attraction for organisations is that the SFO has a leniency policy for self-reporters and can reach an out of court settlement, usually involving a fine, without the organisation being convicted. No equivalent policy has been issued in Scotland and so there is therefore no incentive for Scottish organisations to self-report.

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