

31 March 2011 Prosecution Guidance and Guidance on "adequate procedures"

This Bulletin supplements the earlier bulletin setting out the offences in the Act which can be [found here](#).

Following lengthy consultation, these two keenly awaited pieces of guidance to the Bribery Act 2010 were issued on 30 March 2011. Now that Guidance has been published, the way is clear for the Act to come into force on 1 July 2011. The Prosecution Guidance identifies the types of cases and aggravating factors that will indicate that a criminal prosecution should take place. The Ministry of Justice Guidance on "adequate procedures" sets out the procedures that commercial organisations can and should put in place to prevent persons associated with them from engaging in bribery. There is a substantial amount of overlap between the two sets of guidance, as will appear below, but the SFO, CPS and MoJ must be taken to agree with all the guidance since extensive consideration took place within Government before the guidance was issued. We will be vigilant to ensure on behalf of our clients that the policy contained in the guidance is scrupulously followed. Joint Prosecution Guidance of the Serious Fraud Office and the Director of Public Prosecutions.

Key points:

There is an inherent public interest in bribery being prosecuted

- Factors tending in favour of prosecution:
 - If a conviction is likely to attract a significant sentence
 - Any premeditation involved and/or corruption of the person bribed
 - Bribery that facilitates more serious offending
 - If an individual is in a position of authority or trust
- Factors tending against prosecution:
 - Conviction is likely to attract a nominal penalty
 - Minor harm as a result of a single incident
 - Self reporting and remedial action has been taken

There is no exemption in relation to facilitation payments

- Factors relating to facilitation payments tending in favour of prosecution:
 - Large or repeated payments are more likely to attract significant sentence
 - Payments that are planned or accepted as a standard way of business may indicate premeditation
 - Payments may indicate active corruption of the official
 - Non-compliance with clear and appropriate policies of the organisation
- Factors relating to facilitation payments against prosecution:
 - Single payment
 - Payments that came to light through self-reporting and there has been remedial action
 - Compliance with clear and appropriate policies of the organisation
 - Payer was in a vulnerable position arising from circumstances in which the payment was demanded

Hospitality and promotional expenditure

- Such expenditure which is reasonable, proportionate and made in good faith will not be penalised
- Where there is an element of "improper performance" or intention to influence a foreign public official this could form the basis of an offence
- Lavishness and/or hospitality or expenditure which is not clearly connected with legitimate business or was concealed are factors that may be taken into account to determine if an offence has been committed
- Lavish is "beyond what may be reasonable standards in the particular circumstance".

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Failure of commercial organisations to prevent bribery

- Commercial organisations are liable if an associated person is or would be guilty of an offence, however it does not require a prosecution of that individual.
- Commercial organisations include those incorporated or formed in the UK or those that carry out its business or part of the business in the UK, irrespective of where the acts or omissions may be committed.
- There is a defence if the corporate offence can show it had adequate procedures in place to prevent a person associated with it from bribing.
- There can also be corporate liability if someone with a "directing mind" bribes, receives a bribe or encourages or assists someone else to do so.

Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing.

Section 1: Offences of bribing another person

- The bribe can be an offer, promise or gift of a financial or other advantage.
- Requires either an intention to bring about or reward the improper performance of another of a relevant function or activity or to know or believe that acceptance in itself constitutes improper performance.
- Covers bribery in both the public and private sector.
- Improper performance is a breach of an expectation to act in good faith, impartially or in accordance with a position of trust.
- Improper performance is what a reasonable person in the UK would expect in relation to the performance of that function or activity unless the performance is not subject to UK law and there is written law that permits it in the applicable country.
- Inviting foreign clients to a sports event as part of a PR exercise to cement good relations or enhance knowledge is extremely unlikely to be evidence of an intention to induce improper performance of a relevant function.

Section 6: Bribery of a foreign public official

- An offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of their official functions and of obtaining or retaining business or an advantage in the conduct of business.
- S6 requires that the advantage was not legally permitted as determined by written law applicable to the public official, for example where additional investment in the local economy or benefit to the local community is permitted or required in written law.
- The intention is to prohibit the influencing of decisions making in publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence.
- S6 does not require proof of the improper performance or an intention to induce it.

Hospitality and promotional expenditure

- Although it is not the intention to criminalise bona fide expenditure, it is recognised that hospitality and promotional or other similar business expenditure can be deployed as bribes
- For s6 offences, there must be an intention to influence the official in his or her official role and thereby secure business or a business advantage. In some circumstances travel or accommodation may not be such an advantage as the cost would otherwise be borne by the relevant foreign Government rather than the individual.
- The standards of norms applying in a particular sector may be relevant but is not of itself evidence that no bribe was paid if there is other evidence to the contrary.

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S7 corporate offence of failing to prevent bribery on behalf of a commercial organisation. There is a full defence of having adequate procedures to prevent bribery.

- The guidelines recognise that "no bribery prevention regime will be capable of preventing bribery at all times".
- The defence is included to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.
- In addition the organisations willingness to self report and co-operate with an investigation will be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.
- Adequacy of the bribery prevention procedures will depend on the final analysis on the facts of each case.

The corporate offence

- The organisation must have failed to prevent conduct that would amount to the commission of an offence under s1 (Bribing another person) or 6 (Bribery of a foreign public official) whether or not an individual has been convicted.
- Corporate liability may also arise where any of the main offences under the Act is committed by someone with a "controlling mind" in the company.

Relevant commercial organisation – jurisdictional reach

- Commercial organisations include those incorporated or formed in the UK or those that carry out business or part of their business in the UK, irrespective of where or by whom the acts or omissions may be committed.
- The courts will be the final arbiter on whether a corporation "carries on business" and if it is "in any part of the UK", however the Government's intention is that there will be a common sense approach. • Lavishness and/or hospitality or expenditure which is not clearly connected with legitimate business or was concealed are factors that may be taken into account to determine if an offence has been committed
- The guidance states that organisations which do not have a demonstrable business here will not be caught. The guidance states "the Government would not expect, for example, that the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange would of itself qualify as carrying on business or part of a business in the UK"
- A parent company with a UK subsidiary will not be automatically carrying on business as the subsidiary may act independently of its parent or other group companies.

Associated person

- Again this has a deliberately broad definition and includes any person or body who performs services on behalf of the organisation, to be determined by all the relevant circumstances.
- Participation in a supply chain, or in a joint venture may result in liability if a bribe is paid with the intention of benefitting the corporate, however the fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the intention required.
- Liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. An intention to obtain or retain business or a business advantage for the parent company or other subsidiaries is required (even though they may benefit indirectly).

Facilitation payments

- Defined as "small bribes to facilitate routine Government action" and are not exempted as "bribes" by the Act.
- The guidance states that the Government does recognise the problems that commercial organisations face in some parts of the world and in some sectors. It also states that the eradication of facilitation payments at a national and international level is a long term aim with businesses having a role to play through their selection of bribery prevention procedures.

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Duress

- The common law defence of duress is likely to be available where individuals have to make payments in order to protect against loss of life, limb or liberty.

The Six Principles'

- These are designed to inform those wishing to put procedures in place to prevent bribery.
- They are not prescriptive and are intended to be flexible depending on the size, structure and sector of the commercial organisation and proportionate to risk.

Principle 1: Proportionate Procedure

- The policy and procedures should be proportionate to the bribery risk the company faces and the nature, scale and complexity of its activities.
- They should also be clear, practical, accessible, effectively implemented and enforced.

Principle 2: Top-level commitment

- This means commitment at board of directors, owners or equivalent level to preventing bribery by persons associated with it and fostering a culture in which bribery is never acceptable.
- Internal and external communication of zero tolerance to bribery and top-level involvement in bribery prevention.

Principle 3: Risk Assessment

- Periodic, informed and documented assessment of the nature and extent of exposure to external and internal risks of bribery on the organisations behalf by persons associated with it.
- Commonly encountered risks can be categorised in 5 broad groups: Country; Sectoral; Transaction; Business opportunity; Business partnership

Principle 4: Due Diligence

- Due diligence procedures (proportionate and risk-based) in respect of persons who perform services for and on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5: Communication (including training)

- Policies need to be embedded and understood throughout the organisation through internal and external communication, including training, proportionate to the risk

Principle 6: Monitoring and review

- Procedures to be monitored and reviewed and make improvements where necessary

Contact

If you have any questions about the above, please contact your Kingsley Napley representative, or alternatively:



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