

## The Bribery Act 2010 – Guidance Published

### Background

The Bribery Act 2010 ("the Act") will come into force on 1 July 2011. It replaces the UK's existing laws on bribery and introduces a new strict liability corporate criminal offence of failing to prevent bribery. Organisations and individuals prosecuted under the Act will face heavy penalties if convicted.

Under the Act there are four main offences. In short, they are:

- offering, promising or giving a bribe (active bribery) – section 1
- requesting, agreeing to receive or accepting a bribe (passive bribery) – section 2
- the specific offence of bribing a foreign public official – section 6
- the corporate offence of a failure by a commercial organisation to prevent persons associated with it from bribing another person on its behalf – section 7

### Adequate Procedures and Prosecution Guidance Published

There is a defence to the newly created offence which may be committed under section 7 of the Act. It is a defence for an organisation to prove that despite a particular instance of bribery, it had adequate procedures in place to prevent people associated with it from bribing.

Under section 9 of the Act the Minister is required to publish Adequate Procedures Guidance (the "MoJ Guidance") on the defence that commercial organisations will have if prosecuted for the offence of failing to prevent bribery. A Draft of this Guidance was published last September and was subject to consultation. It was criticised for being vague and unworkable for many businesses. Concern was expressed over the lack of clarity over facilitation payments and what would be an acceptable form of Corporate Hospitality. Further guidance was also requested as to the meaning of "Associated Persons".

The Act was due to come into effect in April 2011 and the expectation was that the final Guidance was to be published in January, well in advance of commencement. However, the Government realised that far more consideration needed to be given to the concerns raised in the consultation responses and lobbying by the business community.

The eagerly awaited final *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* was published by the Ministry of Justice ("the MoJ Guidance") was published on 30<sup>th</sup> March, with the Act now coming into force on 1 July 2011. The guidance is intended to assist commercial organisations of all sizes and across all sectors in understanding what is required of them to ensure that they do not fall foul of the Act. It is bold in comparison the Draft Guidance, which scrimped on detail and was circumspect. The Ministry of Justice has also published its *Quick start guide*, primarily aimed at small businesses, although this does not form part of the statutory guidance. Both seek to reassure senior management of well run businesses that the Act is not intended to bring the full force of the criminal law to bear due to an isolated incident, but rather to assert the importance of the issue and encourage effective procedures to be put in place.

The statutory purpose of the MoJ Guidance is to provide a toolkit for commercial organisations looking to ensure that adequate procedures to prevent bribery were be in place. Instead, it goes much further and seeks to define the circumstances in which bribery may, or may not have been committed. In the Draft Guidance very little was said about corporate hospitality. In stark contrast, the Minister's foreword to the MoJ Guidance makes it plain that genuine client entertainment which could include attending the Grand Prix and Wimbledon, would not be caught by the Act.

The 30 March was also the day that the Serious Fraud Office published its Joint Prosecution Guidance together with the Director of Public Prosecutions ("the SFO Guidance"). The SFO Guidance is intended to

assist prosecutors in deciding whether to bring criminal proceedings under the Act. It is of note that the SFO Guidance requires a prosecutor to have regard to the MoJ Guidance.

Both the draft and the final MoJ Guidance set out six principles to assist businesses. However, the final MoJ guidance has amended two of these with 'Clear practical and accessible policies and procedures' and 'Effective implementation' being replaced by 'proportionate procedures' and 'Communication'.

The full list of principles is:

1. Proportionate procedures
2. Top-level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

#### 1. Proportionate procedures

This new heading has gone some way in allaying businesses fears surrounding the new Act as it emphasises the policy that proportionality is a vital consideration in both the policy-making and in the prosecution.

The MoJ Guidance notes that procedures should be proportionate to the risks that the individual organisation faces, necessitating a risk assessment and tailored procedures to be developed. Aspects including the size, nature and complexity of the business and the type and nature of the persons associated with it will all be relevant to the procedure that will need to be developed. It is also necessary for the procedure to be designed to prevent bribery by 'associated persons' (see below for more detail).

#### 2. Top-level commitment

The MoJ Guidance highlights that, in line with the policy behind the Act, those at the head of the business need to be involved to foster a culture of integrity with a commitment to zero-tolerance to bribery. The MoJ Guidance clarifies that management should be committed to both:

(i) communication of the organisation's anti-bribery stance – both internally and externally. This will include demonstrating that an anti-bribery culture has been embedded in the firm by providing a commitment to carry out business fairly, openly and honestly. An explanation of the consequences of breaching the policy should be provided to both employees and other 'associated persons' as well as the benefits of rejecting bribery; and

(ii) involvement in developing anti-bribery procedures.

#### 3. Risk assessment

This principle has been expanded from the Draft Guidance, highlighting the common-sense approach that the MoJ Guidance has taken to the Act and the need for measures to be proportionate to the organisation's size and structure.

Risk assessment should include:

(i) external risks such as the country and sector in which the transaction takes place as well as risks inherent to the type of transaction; and

(ii) internal risks including any deficiencies in employee training and a bonus culture that may reward excessive risk taking.

The MoJ Guidance emphasises that the assessment must be periodic, informed and documented.

#### 4. Due Diligence

The MoJ Guidance is more practical than the draft as it recognises that a proportionate and risk based approach is necessary and that the level of due diligence required for different relationships will vary enormously depending on the particular relationship and associated risks. The MoJ Guidance does reiterate that due diligence should not be viewed as a one-off event at the beginning of a relationship and that the monitoring of associated persons should continue throughout.

#### 5. Communication (including training)

This was previously under the heading of 'Effective Implementation' and continues to emphasise the need

for the organisation to ensure the anti-bribery policies are embedded and understood throughout the organisation. Again, this will vary depending on the organisation, but internal communications would be advised to include a clear statement of the organisation's policies and procedures as well as procedures for raising concerns about bribery should it be detected. Information on the organisation's code of conduct, procedures, controls and sanctions may also want to be communicated externally.

## 6. Monitoring and Review

This is similar to the Draft Guidance in highlighting that the business needs to recognise that bribery risks will change over time. The MoJ Guidance suggests that some organisations (again, if this is proportionate) may wish to consider seeking some form of external verification of the effectiveness of their procedures. The MoJ Guidance also points out that the an organisation may wish to review its processes in response to other stimuli such as governmental changes or negative press reports.

### Other areas

The MoJ Guidance has also provided welcome insight into a number of other areas that were causing concern under the Act:

#### Carrying on Business in the UK

This had not been addressed in the draft guidance and so the attempt at definition in the MoJ Guidance comes as a welcome relief. They have explained that a 'common sense approach' must again be taken, so that businesses will need to have a 'demonstrable business presence' in the UK in order to be caught by the Act. Therefore, the guidance confirms that having a UK subsidiary will not, in itself, mean that the parent company will fall under the Act.

The MoJ Guidance also suggests that a company listed on the London Stock Exchange would be unlikely to be, of itself, enough to make the organisation considered as carrying on a business in the UK. However, it had been suggested that this appeared to be contrary to the intentions of the Act and Richard Alderman of the SFO confirmed in an interview that he was of the opinion that a listing would mean that the organisation would fall under the Act. He highlighted that the SFO has a 'very wide jurisdiction' and warned organisations 'should not rely on over-technical interpretations of the Act'.

#### 'Associated persons'

The MoJ Guidance provides greater clarity than the view put forward in the Draft Guidance. It confirms that suppliers are not automatically 'associated persons' if they are selling goods but would have to be supplying services. The draft had also suggested that the entire 'supply chain' may come under this definition, but the MoJ Guidance has now recognised that business may only have a contractual relationship (and therefore hold any control) with the top supplier and it suggested that businesses could ask its direct supplier to include appropriate anti-bribery provisions with the next party in the chain.

The MoJ Guidance also allays fears with regards to joint ventures as it recognises that the legal relationship between the joint venture entity and its members does not *automatically* mean that they are associated. This will depend partly on the degree of control the joint venture has over a bribe paid by its employee or agent.

The MoJ Guidance clarifies that the payment of a bribe by an 'associated person' to a subsidiary where the subsidiary does not come under the Act will not necessarily mean that the parent or sister company is in breach of the Act. The associated person must have clear intention to *obtain business for the parent or sister company* rather than the subsidiary and that indirect benefits are insufficient.

## Section 1 – Offences of Bribing another person

There was concern that this may effectively put a stop to corporate hospitality but the MoJ Guidance has confirmed that, not only is this subject to the principles of proportionality and common sense, but that the prosecution would have to show that the hospitality was *intended* to bring about the improper performance. Issues such as the industry norm, the type and level of advantage, the extravagancy of the hospitality will all be taken into consideration. The MoJ Guidance includes helpful case studies (although these are strictly speaking, **not** part of the Guidance) to reinforce the fact that bona fide business expenditure aimed at improving the image of a business or to help establish relationship is unlikely to be an offence. This will be judged by what a reasonable person in the UK would think, even if this was undertaken elsewhere.

The SFO Guidance provides further aid in that it suggests that factors pointing towards an offence will include where it was not clearly connected with legitimate business activity and where there was an attempt at concealment.

## Section 6 – Bribery of a foreign public official

The MoJ Guidance has now recognised the difficulty that some businesses will face with this in some areas of the world and has relaxed its position slightly as compared to the draft guidance. The MoJ Guidance confirms that where this is in line with the written local law then there will be no offence. It has also suggested that the defence of duress may apply in some situations and encourages prosecutors to take a flexible view taking into account what is in the public interest.

The SFO Guidance has suggested that large or repeated payments are more likely to be prosecuted severely, as are any suggestions of premeditation or element of actively corrupting the official. The SFOs general principles on public interest considerations will also play a part, which include the seriousness of the offence, any history of similar conduct, an ineffective corporate compliance programme, any previous sanctions and any self-reporting. The SFO Guidance suggests that businesses should not rely too heavily on the 'public interest' test however as '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.'

### SFO Guidance

The SFO Guidance recognises that they have to take into account the MoJ Guidance but, as mentioned above, they have suggested a slightly stronger approach. Roderick Macauley (Bribery Act Implementation Manager at the MoJ) has accepted that the MoJ Guidance is not intended to weaken the Act and it is open to the SFO to interpret the Act in its own way. Although the public interest test will come as a relief to organisations, the SFO Guidance states that bribery is 'a serious offence' and 'there is an inherent public interest in prosecuting it'.

### Summary

The MoJ Guidance is not definitive; every commercial organisation will need to assess the risks to its particular business and put in place procedures appropriate to the size and nature of the business. The MoJ Guidance has gone some way to relieve fears of the Act making the UK uncompetitive due to harsh restrictions on facilitation payments and corporate hospitality and focuses on a common sense approach and the need for proportionality. Although emphasising the need for individually tailored policies, the MoJ Guidance is very practical compared to the draft guidance and includes a number of helpful case studies on corporate hospitality, facilitation payments and joint ventures.

To access the MoJ Guidance or the Quick Start Guide in full, please follow this link to the Ministry of Justice website: <http://www.justice.gov.uk/guidance/bribery.htm> (Crown copyright).

Blake Laphorn advises businesses on the impact of the Act and about the adequate procedures defence. Even organisations with existing anti-bribery policies and procedures should review these to ensure compliance with the Act.

### Contact

If you require any assistance or guidance in understanding what the Bribery Act 2010 means for your business, please contact

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