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[online version](http://www.charltonslaw.com/uk-bribery-act-2010-to-come-into-force-uk-moj-publishes-guidance-on-adequate-procedures-defence-and-dpp-and-sfo-publish-joint-prosecution-guidance/)

# UK Bribery Act 2010 To Come Into Force On 1 July 2011: UK MoJ Publishes Guidance On Adequate Procedures Defence And DPP And SFO Publish Joint Prosecution Guidance

## Introduction

On 30 March 2011 the UK Ministry of Justice published its [Guidance](http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf) (the **MoJ Guidance**) ([see archive](bribery-act-2010-guidance.pdf)) on procedures which commercial organisations can adopt in order to prevent persons associated with them from committing offences under the UK Bribery Act 2010 (the **Act**). The Act comes into force on 1 July 2011. The publication of the Guidance is a statutory duty imposed on the Secretary of State for Justice by section 9 of the Act. On the same date, the Director of the Serious Fraud Office (**SFO**) and the Director of Public Prosecutions (**DPP**) published their [Joint Guidance](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf) (the **Joint Guidance**) ([see archive](bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)) on Prosecution under the Act. These two documents are designed to assist companies and individuals to understand the scope of the Act and their responsibilities under it. This newsletter examines the two sets of Guidance. However, the main points of both may be summarised as follows:

### The Guidance:

* Once corporate hospitality and promotional expenditure are reasonable, bona fide and proportionate in all the circumstances, they will not fall within the scope of the Act.
* The final determination of the meaning of the crucial term "carries on a business or part of a business" is to be made by the courts.
* However the expectation is that organisations without a demonstrable presence in the UK will not come within the scope of this term, with the Guidance stating that a listing on the London Stock Exchange or the presence of a subsidiary in the UK will not of themselves be enough to warrant a finding that an organisation is "carrying on a business" in the UK.
* No alleviation of the harshness of the regime as regards facilitation payments is attempted, although the Guidance intimates that prosecutorial discretion may have this effect.
* The Guidance suggests that an organisation can limit its liability to suppliers by employing anti-bribery safeguards in its dealings with its direct contractual counter-party in a supply chain.
* The extent of an organisation's liability to joint ventures of which it is a part depends on whether the joint venture is run by contract or via a separate legal entity.
* The six principles on which the Guidance advises a company to formulate its anti-bribery procedures are not intended to be exhaustive and/or mandatory.
* The key point of the six principles is that measures put in place by an organisation should be proportionate to the risk that organisation faces.

### The Joint Guidance

* Prosecutions for the making of facilitation payments will proceed unless the prosecution "is sure" that there are stronger public interest arguments on the side of non-prosecution.
* In line with the Guidance, the Joint Guidance declares corporate hospitality and promotional expenditure to be important and legitimate business practices and notes that prosecution will not proceed as long as they are bona fide, reasonable and proportionate.
* An organisation attempting to establish the adequate procedures defence under section 7 must do so on the balance of probabilities. The final determination on adequacy is a matter for the courts.
* A single act of bribery does not automatically result in a finding of inadequate procedures, particularly if it occurred due to an employee purposefully ignoring well designed anti-bribery safeguards.
* Prosecutors must consider the Guidance when assessing whether or not an organisation’s anti- bribery safeguards are adequate.

## Background To The UK Bribery Act 2010

The Act represents an attempt on behalf of UK legislators to improve the law relating to bribery and corruption, an attempt prompted by increasing criticism of the UK's regulatory framework in this area by the Organisation for Economic Cooperation and Development (**OECD**). UK law in this field is inconsistent with the OECD Bribery Convention, which the UK ratified in 1998. In response to this criticism, particularly of the UK's handling of the BAE corruption case, a process of reform was commenced by the Law Commission in 2008. This led to the drafting of the Bribery Bill, which was placed before parliament in November 2009. The Act received Royal Assent on 8 April 2010 and was originally to enter into force in October 2010, before being delayed until April 2011. However the implementation of the Act was then delayed for a second time. This delay was prompted by the MoJ confirming that further time was required to complete the Guidance on adequate procedures which is under discussion in this newsletter. Now that the Guidance and the Joint Guidance have been published, the Act is to come into force on 1 July 2011. A [discussion of the implications of the Act](/newsletters/hklaw/en/2011/111/nl-hklaw-20110214-111.html) for businesses operating in Asia can be found on the Charltons website.

This note includes a summary of our understanding of certain features of the Act. Please note however that Charltons does not advise on English law and that this note is provided for information purposes only and should not be relied upon.

## Part 1: The MoJ Guidance On Procedures Commercial Organisations Can Put In Place To Prevent Bribery

### Introduction

The MoJ are very clear in the introduction to the Guidance that it is not a definitive document detailing a means of ensuring that liability under the Act can be avoided by organisations. Rather it gives more general advice, structured around six key principles, each of which is illustrated by case studies attached to the Guidance as Annex A. From the outset, the MoJ emphasise that whether or not procedures were adequate to prevent bribery is a question of fact and circumstance, and factors such as the size and nature of the organisation claiming the defence will be particularly relevant. The Guidance endorses approaches to preventing bribery which are founded on principles of risk management, with a focus on taking measures which are proportionate to the specific risks faced by an organisation.

## The Offences Under The Act

The new Act contains four categories of offence, each covering a different form or aspect of bribery. They are as follows:

* The section 1 offence of offering, promising or giving a bribe to another person
* The section 2 offence of requesting, agreeing to receive or receiving a bribe from another person
* The specific offence detailed in section 6 of bribing a foreign public official
* The strict liability corporate offence of failing to prevent bribery detailed in section 7, from which a full defence is available to an organisation able to demonstrate that regardless of an actual offence of bribery having occurred, it had adopted adequate procedures designed to prevent such instances of bribery from taking place.

The most important of these offences when examining the Guidance is section 7, which imposes liability upon a commercial organisation when it fails to prevent a person associated with it from committing an offence under section 1 or 6. There is no requirement for a person to have been convicted of either a section 1 or 6 offence to engage the section 7 offence, although the prosecution must prove beyond a reasonable doubt that such an offence was actually committed. The Guidance discusses each of these offences in turn, focusing on how commercial organisations might best avoid liability under their terms.

### Section 1: Offence of Bribing another Person

An offence is committed under section 1 of the act where a person offers, promises or gives a financial or other advantage (the term "financial or other advantage" is not defined in the act) to another person in the following two scenarios:

* Case one, where P intends the advantage to bring about an improper performance of a relevant function or an activity by another person or to reward such improper performance (section 1(2)).
* Case two, where P knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity (section 1(3)).

Corporate hospitality was cited by some critics of the Act as an area where section 1 could have excessively harsh effects on commercial organisations. However, the MoJ note that in order to show that the hospitality amounted to a bribe under section 1, the prosecution would be obliged to demonstrate that the aim of the hospitality was to induce conduct in the targeted person which a reasonable person in the UK would consider to be in breach of an expectation to act in accordance with a position of trust, impartially, or in good faith. The example provided in the Guidance is of an invitation to corporate clients to watch a sports event, such as a rugby match at Twickenham, as an effort to enhance relations between business partners. The MoJ note that in such a situation it would be very difficult to bring an action under section 1, as it is doubtful that there will be evidence pointing to an inducement to perform a function in an improper fashion.

### Section 6: Bribery of a foreign Public Official

Although the new bribery offences in sections 1 and 2 have substantial extra territorial effect, the Act also creates a new specific offence of bribing a foreign public official. The offence can be reduced to three constituent parts:

* The briber must intend to influence the foreign public official in his capacity as foreign public official, even if he does not have authority to use the position in the manner which the briber desires,
* The briber's intention must be to obtain or retain business or a benefit in the conduct of business,
* The briber must directly or via a third person, offer financial or other advantage to the foreign official or to another person at the foreign official's request.

However, the MoJ emphasise that the offence is not borne out if the foreign official is allowed or obliged, in accordance with applicable written local law, to be influenced in his capacity as a foreign public official by the advantage promised. The term foreign official is very widely defined and includes government officials, and those employed by public bodies.

The MoJ also highlight the difference between section 1 and section 6 liability, namely that under the latter there is no requirement for the prosecution to show that a "relevant function" was improperly performed, or that the person intending to influence the foreign official intended to induce any improper action. The MoJ state that the reasons for this broad drafting of the section are that it can often be extremely complicated to define exactly what the relevant functions of a foreign official are, and that forcing the prosecution to rely on foreign governments to supply them with such evidence would be an unfair burden.

#### Local Laws

The MoJ also discuss the effect of local written laws which permit or oblige a foreign official to be influenced by an advantage offered by the organisation. As noted above, where such circumstances exist, no prosecution can be brought under section 6. Again the Guidance contains a useful example of such a situation, citing local planning laws which permit a company seeking planning permission to engage in community investment.

Furthermore, the MoJ state that where the foreign written law is silent on whether or not public officials may be influenced in the exercise of their functions by, for example, the offer of additional community investment, prosecutorial discretion will be used in assessing whether or not it is in the public interest to commence an action under the Act. The Guidance describes this consideration of the public interest by prosecutors as an "appropriate backstop" when the evidence points to additional expenditure being a bona fide part of the tender process.

#### Hospitality, Promotional and other Business Expenditure

As noted above, a number of businesses were extremely concerned that the Act would outlaw essential and legitimate business practices connected to corporate hospitality and expenditure. However the MoJ state that it is not their intention to criminalise activities in this area which are bona fide, proportionate and reasonable, and which aim to improve the image of a company, create better relations with others or show its products in a favourable light.

The MoJ point out that the offence requires the offering of an advantage to the foreign official and that covering the cost of accommodation or travel does not constitute an advantage to the official, as these are costs which would be covered by his government, not himself. Furthermore the prosecution must establish a satisfactory connection between the alleged bribe offered and the business advantage which the alleged briber sought. This is generally an assessment which will be made on all the facts of the case at hand, states the Guidance. Factors to be taken into account are the level of expenditure which actually occurred, the level which would be considered reasonable and proportionate in this sector and the position of the public official vis a vis the decision the organisation may wish to influence.

Examples of hospitality and corporate expenditure which the MoJ note as being acceptable in the Guidance include:

* reasonable travel and accommodation for public officials to perform a safety inspection of a mine; and
* flights, accommodation, fine dining and tickets to a sports event (for the official and his/her partner) when a high level public official meets corporate executives in New York, due to the city being a suitable meeting place for both parties.

The key point which the Guidance makes is that such expenditure must be proportionate and reasonable. So while the latter example above may be acceptable in the circumstances as described, the MoJ clarify that it may fall within the scope of the offence if the meeting could easily have taken place a week earlier when all the parties were present in London. Moving from the mining inspection to a week long five star resort holiday would be similarly disproportionate. The final word in this section from the MoJ is that organisations have a responsibility to formulate standards on hospitality and corporate promotion which are appropriate to their particular situation.

### Section 7: Failure of Commercial Organisations to Prevent Bribery

Perhaps the most controversial element of the new Act is the section 7 offence it introduces, which penalises "relevant commercial organisations"[[1]](#footnote-40) which fail to prevent persons associated with them from committing bribery on their behalf i.e. intending to obtain or retain business or a business advantage for the organisation.

However a full defence is available to an organisation which can demonstrate, that regardless of an actual offence of bribery having occurred, it had adopted adequate procedures designed to prevent such instances of bribery from taking place. The Guidance confirms that the standard of proof which the organisation must satisfy to establish the defence is the balance of probabilities.

#### Commercial Organisation

Under the Act, the term "relevant commercial organisation" is defined as any of the following:

* A body that is incorporated under the law of any part of the UK and that carries on a business anywhere (whether in the UK or elsewhere).
* Any other body corporate (wherever incorporated) that carries on a business, or part of a business, in any part of the UK.
* A partnership that is formed under the law of any part of the UK and that carries on a business anywhere (whether in the UK or elsewhere).
* Any other partnership (wherever formed) that carries on a business, or part of a business, in any part of the UK.

#### Carrying on a business or part of a business

The most important part of this definition is the phrase "carries on a business or part of a business", which is not defined in the Act. The liability of many international organisations under the Act will be determined by the meaning attributed to this term. The definitive determination is to be made, according to the Guidance, by the courts. However the Guidance does set out the MoJ’s position as to how the phrase should be interpreted:

* The Guidance espouses a common sense approach to bodies incorporated or partnerships formed in the UK, stating that any organisation, whether it be charitable, public function orientated or otherwise, which engages in commercial activities will come within the meaning if the phrase
* A common sense approach is also to be used when evaluating whether or not a body formed or incorporated outside the UK is to be regarded as carrying out a business there, thus bringing it within the definition of relevant commercial organisation and within the scope of the Act. Although the Guidance reiterates that the final decision is with the court, the expectation expressed is that a common sense approach would exclude organisations without a "demonstrable business presence in the UK" from the scope of the Act. The MoJ give two examples of situations where it would not foresee an automatic finding that an organisaiton was carrying on a business in the UK, stating that the fact that:
	1. a company's securities are trading on the London Stock Exchange; or
	2. the company has a UK subsidiary,
* may not, in itself, result in that company coming within the regulatory ambit of the Act. This part of the Guidance has been heavily criticised in the UK media, with some seeing it as a carve out from the effects of the Act, aimed at ensuring that foreign companies continue to do business in the UK.

#### The concept of an associated person

The definition given to "persons associated with a commercial organisation" is very wide, and takes in all persons "performing services" on behalf of the organisation. Under section 8 (4) of the Act, the determination as to whether services are being performed in this manner is made following consideration of all the surrounding circumstances, and does not simply rely on the nature of the relationship between a person and a company. This wide drafting could cover such natural and legal persons as agents, employees, subsidiaries, intermediaries, joint venture partners, contractors and suppliers.

However, with regard to supply chains, the Guidance points out that, in general, an organisation will only have some measure of control over its counterparty and not other links in a supply chain. The Guidance recommends that the organisation include anti-bribery safeguards in its dealings with its counterparty, and request that the counterparty do the same and so on, thereby creating a sequence of anti-bribery defences.

#### Joint Ventures

The Guidance differs in its treatment of joint ventures, depending on whether they are run via a separate legal entity or on a contractual basis. In the case of the former, an offence committed by the joint venture entity may lead to liability being imposed on a member of the joint venture, if the joint venture was providing services on the member's behalf. However, the joint venture is not, according to the MoJ, to be regarded as automatically being "associated" with its members. Thus if an employee pays a bribe with the intention of gaining an advantage for her employer, the joint venture, this does not of itself lead to liability on the part of the members of the joint venture, where that liability is based solely on the benefit they may receive tangentially through their investment in it.

In the case of the latter, a joint venture based on a contract, the determination of whether or not liability should be imposed on a member of the joint venture, for the paying of a bribe by a joint venture employee, is likely to be made via consideration of factors such as the amount of control that a signatory party has over that contractual arrangement.

#### The requirement of showing intention to benefit the organisation

The Guidance also underlines the fact that in order for liability to be imposed on an organisation under the Act, the person performing services (e.g. a joint venture, employee, subsidiary) must intend that the person intended to obtain or retain business or a business advantage for the organisation through his actions. The Guidance counsels that a mere tangential benefit which results from the payment of a bribe is probably not enough to show the definite intention required.

As an example of how this principle would operate, the MoJ give an example of a scenario where an employee of a subsidiary commits an offence under the Act. According to the Guidance, this will not automatically impose liability on the parent company, or any other subsidiaries of the parent company, unless it can be demonstrated that the employee in question intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is the case regardless of whether the parent company or other subsidiaries received some form of indirect benefit as a consequence of the bribe.

#### Jurisdiction

The extremely broad jurisdictional scope of section 7 has been a source of major controversy in the lead up to the implementation of the Act. While a close connection with the UK must be demonstrated where action is to be taken against a person committing a bribery offence outside the UK under sections 1, 2 or 6, section 7 has no such limitation. Section 7 has the effect of imposing liability on an organisation where a person associated with the organisation commits a section 1 or 6 offence outside the UK, so long as the organisation is incorporated, formed or carries on business or part of a business in the UK. The person committing the offence need not be a UK national, or resident, nor need they be incorporated or formed in the UK. The effect of these rules is best understood by considering an example; if Company A, incorporated in Hong Kong, has a subsidiary based in the UK it may be understood to be "carrying on a business" there and therefore liable under section for an act of bribery, of which it had no knowledge, committed by one of its agents in India.

### Facilitation Payments

A major cause for concern among business leaders as regards the Act is the fact that it continues to criminalise facilitation payments. These are small bribes awarded to government officials in order to streamline official procedures and are a widespread practice for those doing business, especially in parts of the developing world. The US Federal Law Foreign Corrupt Practices Act (**FCPA**) 1977 makes an exception in its anti-bribery regime for such payments. The Guidance highlights the corrosive effect such payments have on world trade and while it also acknowledges the obstacles faced by business in some jurisdictions, it directs organisations to address this problem via effective anti-bribery procedures.

### Duress

The Guidance accepts that situations may occur where a failure to commit an offence under the Act may cause an individual serious danger or harm, noting that the common law defence of duress "is very likely" to be available in such situations.

### Prosecutorial Discretion

The Guidance suggests that prosecutorial discretion may be a means of keeping cases, which first appear to be breaches of the rules on hospitality, facility payments or promotional expenditure, out of the courts. Prosecution will only occur where it is in the public interest, which lends flexibility to the regime established by the Act. These issues are discussed in more detail in Part 2 of this newsletter, which deals with the Joint Guidance of the DPP and SFO.

## The Six Principles

The Guidance outlines six principles which the MoJ suggest should serve as the foundation for the anti-bribery procedures which commercial organisations wishing to establish the section 7 defence must put in place. These six principles are not intended to create an exhaustive and mandatory set of factors guaranteeing that an organisation's procedures will be considered adequate under the Act. Rather they aim to assist organisations in understanding the kind of procedures they should put in place to guard against bribery.

The Guidance explicitly recognises that different companies will require different procedures if they are to be considered adequate by the courts. For example, companies which operate exclusively in the domestic markets of the UK are likely to have less need for extensive anti-bribery measures than large multinationals. In cognisance of the different circumstances in which companies operate, the MoJ's principles make suggestions and recommend factors to be taken into account when developing and stress testing anti-bribery regimes. The key focus is on ensuring the anti-bribery defences are proportionate to the risk of bribery faced by the organisation.

### Principle 1: Proportionate Procedures

The key to the first principle is that the procedures an organisation puts in place to combat bribery are tailored to the challenges it faces and to its type, size and sophistication. These procedures should also be "clear, practical, accessible, effectively implemented and enforced". The Guidance also makes clear that the term "proportionate procedures" encompasses both wide ranging anti-bribery policies and the practical rules which implement them.

In its commentary on Principle 1, the MoJ emphasise that a firm-wide risk assessment process is a key "first step" in formulating the procedures needed to combat bribery. While reiterating that different sizes and types of organisations will need different risk detection mechanisms, the Guidance highlights the importance of tailoring the procedures to face specific risks. This is due to the fact that although a wide-ranging set of anti-bribery procedures is required, the courts are likely to look for individual procedures designed to counter the danger of the particular associated person in the case before them committing an offence.

The Guidance then gives an indicative and non-exhaustive list of the elements which a commercial organisation may wish to include in its anti-bribery procedural framework. On the policy front these include a statement of intent to prevent bribery, an overview of its anti-bribery strategy and its general approach to mitigating particular bribery risks, such as those arising from corporate hospitality or the conduct of agents. On the procedural side, elements mentioned in the Guidance include how recruitment is managed, the manner in which business relationships are conducted, how tasks are delegated and conflict of interest avoided, how the rules will be enforced and how the role of the whistle blower is encouraged.

### Principle 2: Top Level Commitment

This principle highlights the importance for leaders of an organisation, whether the board of directors, managing partners or senior management, of leading by example. They should establish and publicise (internally and externally) a corporate culture where corruption is not tolerated, while also remaining involved in the development of anti-bribery procedures. The Guidance again offers an indicative list of the type of assertions which top level management may wish to make regarding their anti-bribery regime. These include stating that the organisation has a zero tolerance approach to bribery, identifying personnel and departments which are central to the anti-bribery procedures and the consequences of violating the procedures for employees and management. It is noteworthy that the Guidance extends this last point to include an outline of the consequences for associated persons who breach the anti-bribery procedures, suggesting that firms pledge not to do business with those who do not make operating without bribery a best practice aim.

The Guidance also notes that top level involvement will differ depending on the size of the organisation, with managers in smaller organisations having a more hands on approach than those in large multinationals, whose role may be to set anti-bribery strategy. However, regardless of size, the Guidance lists a number of factors which managers may wish to ensure they are involved in. These include personal involvement in high level anti-bribery matters (where required), selection and training of those heading up the anti-bribery regime and endorsing all anti-bribery publications of the organisation.

### Principle 3: Risk Assessment

In this principle the Guidance advises that the organisation makes regular documented evaluations of the nature and extent of its exposure to the risk of bribery, both from internal and external sources. This may take the form of a specific bribery risk calculation mechanism or be part of a more general risk assessment. Such assessments, according to the Guidance, should have the same basic attributes, such as oversight by top level management, effective allocation of anti-bribery resources and accurate documentation of the procedure and its conclusions. The Guidance then lists 5 common external risks faced by organisations:

* Country Risk - factors include an absence of properly enforced bribery legislation, corruption, and failure of the government, media and business community to ensure transparent investment and procurement policies.
* Sectoral Risk - identifying sectors which carry a higher risk of bribery related activity than others, such as the extractive and large scale industrial sectors.
* Transaction Risk - realising that some varieties of transaction involve higher risks of bribery, such as charitable or political donations, public procurement and the obtaining of licences and permits.
* Business Opportunity Risk - the risks attached to certain activities, such as involvement in high value projects, projects without an obvious legitimate aim, projects which occur at a price not set by the market and those which involve a long chain of contractors or middle men.
* Business Partnership Risk - establishing some business relationships carries more dangers than others, with the Guidance noting that involvement with joint ventures, intermediaries for foreign public officials, or politically dubious people can carry high risks of bribery.

The Guidance also notes a number of internal risk factors which the organisation should be aware of, which include bonus cultures which promote dangerous levels of risk taking and a lack of precision on the organisation’s position as regards corporate hospitality, political/charitable donations and promotional expenditure.

### Principle 4: Due Diligence

This principle relates to the responsibility on organisations to perform adequate due diligence checks on their business partners and employees, in order to ensure that a relationship with them runs little risk in the way of bribery or corruption. The due diligence procedure, as the Guidance notes, is a key part of good corporate governance practice and anti-bribery due diligence should be integrated into the overall framework in this area.

The MoJ highlight the fact that due diligence is both a means of evaluating risk, by identifying general areas where bribery may occur, and a means of mitigating it, as proper due diligence of prospective business partners can reduce any risks attached to doing business with such entities. Again in this section, the Guidance reiterates the importance of proportionality, stating that the intensity of due diligence conducted should match the level of risk of bribery.

Areas where the Guidance recommends caution and extensive due diligence include mergers and acquisitions and the entry of areas where local law or convention demand that a local agent be used. Examples given of higher end due diligence techniques include direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. It can also encompass direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

### Principle 5: Communication (including training)

This principle underlines the significance for an organisation of ensuring that its anti-bribery policy is implemented in a practical and efficient manner and is a key part of the organisation's culture. The methods used to communicate both internally and externally must be proportionate to the form of risk faced by the organisation.

The scale of the framework for implementation will depend largely on the scale of the organisation in question, but some of the suggestions for effective implementation mentioned in the Guidance are an efficient division of responsibility, the use of training courses to familiarise staff with anti-bribery procedures, the publication of these procedures both internally and externally and a well-organized internal reporting system. Policies in specific areas should be communicated internally, with the Guidance highlighting decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels as good examples.

Externally the organisation may wish to draw attention to its anti-bribery procedures by publishing a Code of Conduct, which could include information on bribery prevention procedures and controls, sanctions, results of internal surveys, and rules governing recruitment, procurement and tendering. Finally the Guidance suggests this communication need not be restricted to associated persons, as for some organisations it may be proportionate to inform the wider world of the organisation’s approach to bribery.

While the Guidance endorses mandatory general training in firms' anti-bribery procedures, it also recommends specific training for those involved more directly in those procedures, for example those running the organisations' internal reporting system. Such training should be "continuous, and regularly monitored and evaluated." It should also be highlighted that the Guidance raises the possibility of an organisation demanding (or at least encouraging) that associated persons (which could include, for example, suppliers), especially those perceived as a high risk, undergo training.

### Principle 6: Monitoring and Review

The final principle emphasises the importance of an effective monitoring and review system, in order to ensure compliance with the organisation's anti-bribery regime, and to identify and resolve any problems that arise. Suggestions are made by the Guidance regarding how to structure this system of monitoring and review, such as effective financial controls and reporting, and a system of obtaining feedback on the anti-bribery regime from employees.

The Guidance also recommends the practice of formal reviews and reports for top level management and raises the possibility of seeking outside valediction of anti-bribery procedures, using the anti-bribery standards maintained by industrial sector bodies. However the Guidance cautions that obtaining such valediction is no guarantee that an organisation's anti-bribery regime is to be regarded as adequate under section 7.

### The Guidance's Illustrative Scenarios

Annex A to the Guidance is composed of 11 illustrative scenarios, designed to assist organisations in putting the six principles into practice. All bar one of the scenarios involve foreign officials or entities, as the Guidance states that the risk of bribery is much greater in foreign markets. The scenarios cover the due diligence of agents, proportionate procedures, hospitality and promotional expenditure, risk assessment, top level commitment, communication and training, joint ventures, facilitation payments, and community benefits and charitable donations. The MoJ emphasise in the Guidance that these scenarios are illustrative only and do not form part of the Guidance, and cannot replace or supersede any of its principles.

## Section 2: The Joint Guidance Of The DPP And The Director Of The SFO

### Introduction

For action to be taken under the Act in England and Wales[[2]](#footnote-60), the personal consent of either the DPP or the Director of the SFO (the **Directors**) is required[[3]](#footnote-61). Their decisions on the matter will be taken after application of the two step test prescribed in the Code For Crown Prosecutors (the **Code**), which enquires whether there is enough evidence to provide a realistic prospect of conviction and, if yes, whether it serves the public interest to prosecute.

The Joint Guidance seeks to assist the public in understanding the approach the Directors will take to prosecutions under the Act. It notes at the outset that it is not exhaustive and should be read in conjunction with the Guidance on Corporate Prosecutions and is also subject to the Code. It should also be noted at the outset that the Joint Guidance notes, in the manner of a statement of intention, that "the Act is not intended to penalise ethically run companies that encounter an isolated incident of bribery".

## The Application Of The Code To The Offences In The Act

### Scope of the Act

The Joint Guidance notes that although the Act is firmly focused on preventing commercial bribery, it also encompasses other important spheres of society, such as efforts to sway the decisions of local authorities, regulators or elected officials on matters such as planning permission.

### The general approach to bribery prosecutions

As noted above there is a two stage test which all prospective cases must pass if they are to proceed to prosecution, with the evidential stage being examined prior to the public interest stage. Regardless of how serious or far reaching a case may be, it will not progress to the public interest stage if there is a lack of evidence. The evaluation of whether or not the prosecution of a case is in the public interest is a fact based exercise, with the circumstances of each case to be scrutinised carefully in accordance with the Code. The Joint Guidance then emphasises the importance for prosecutors of Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Britain is obliged to adhere to:

"Investigation and prosecution of the bribery of a foreign public official … shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

### Key terms used in Act

#### Offers and requests

It is noteworthy that the Joint Guidance states that the common usage language employed in the Act is to be broadly interpreted. Therefore where the Act uses phrases like offering, promising or giving a bribe, this is flexible enough to include situations in which an offer can be inferred from the facts of the case. The Joint Guidance cites the example given by the Law Commission to illustrate this point, where an interview conducted in the presence of an open briefcase of cash is to be regarded as an implied offer of a bribe. Furthermore, the Joint Guidance refers to the fact that the Act focuses on conduct and not consequences. What this means is that save where the allegation is that a benefit was actually given or received, there is no requirement for a transaction to complete in order for a prosecution to be brought under the Act.

#### Financial Advantage

Although every offence under the Act includes the offering or receiving of a "financial advantage", the term is not defined under the Act. It is to be left up to the courts to interpret and the Joint Guidance advises that prosecutors use the term in its everyday sense.

#### Improper Performance

As discussed in Part 1 of this newsletter, the notion of improper performance is central to the general bribery offences under the Act (remember that an action under section 7 requires an offence under section 1 or 6 to have occurred). The term is not defined in the Act as it is to be given its natural meaning. The Joint Guidance echoes the Guidance in noting that the concept of improper performance relates to the breach of an expectation to act in accordance with a position of trust, impartially, or in good faith. The test for impropriety is founded upon the reasonable expectations of persons in the UK as regards the performance of the activity in question.

#### Associated Person

As with the MoJ's Guidance, the Joint Guidance highlights the need to take into account all relevant circumstances when appraising whether or not a person qualifies as an associated person. Despite this focus on the nature of what is done, rather than the capacity in which it is done, the Joint Guidance notes that there is a presumption that an employee of an organisation is a person associated with that organisation.

## Section 1: Bribing Another Person

### The legal framework

As noted in Part 1, an offence is committed under section 1 of the act where a person offers, promises or gives a financial or other advantage (the term "financial or other advantage" is not defined in the act) to another person in the following two scenarios:

* Case one, where P intends the advantage to bring about an improper performance of a relevant function or an activity by another person or to reward such improper performance (section 1(2)).
* Case two, where P knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity (section 1(3)).

The Joint Guidance emphasises that the "wrongful intention" in the two cases is different, with the first offence being committed where the advantage offered is intended to induce or reward the improper performance. However the intention required in the second case is different, as the person offering the bribe knows/believes that the acceptance of the bribe intrinsically amounts to improper performance. The Joint Guidance advises prosecutors to consider all direct evidence in existence of actual intention, or knowledge or belief. In addition, the prosecution must assess whether or not such states of mind can be inferred from the situation at hand. Finally the Joint Guidance recommends that Cases 1 and 2 above must be represented by separate charges or counts, as their wrongfulness elements are distinct from one another.

### Public Interest Test

#### Factors favouring prosecution

The Code details a number of factors which point towards prosecution and the following are especially relevant to the Act:

* A conviction for bribery is likely to attract a significant sentence (Code 4.16a);
* Offences will often be premeditated and may include an element of corruption of the person bribed (Code 4.16e and k);
* Offences may be committed in order to facilitate more serious offending (Code 4.16i);
* Those involved in bribery may be in positions of authority or trust and take advantage of that position (Code 4.16n).

#### Factors mitigating against prosecution

Certain cases will have circumstances which tell against prosecution. These may include:

* The court is likely to impose only a nominal penalty (Code 4.17a);
* The harm can be described as minor and was the result of a single incident (Code 4.17e);
* There has been a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions).

## Section 2: Offences Which Concern Being Bribed

### The Legal Framework

Section 2 relates to offences where the offender is the target of a bribery attempt. There are four different situations where a person, R, will be guilty of committing an offence in respect of receiving a bribe, which apply where:

* R requests, agrees to receive or accepts a financial or other advantage:
	+ intending that a relevant function of activity should be improperly performed by R or another (Case 3);
	+ the request, agreement or acceptance is of itself an improper performance of a relevant function of activity (Case 4);
	+ as a reward for improper performance of a relevant function of activity by R or another (Case 5); or
* R or another performs a relevant function or activity in an improper manner, in anticipation of or in consequence of R requesting, assenting to receive or accepting a financial or other advantage (Case 6).

As with section 1, the Joint Guidance advises that the different circumstances above must be represented by separate charges or counts, as their wrongfulness elements are distinct from one another.

### Public Interest Considerations:

These are the same as those outlined above for the section 1 offence.

## Section 6: Bribery Of A Foreign Public Official

### The legal elements

As discussed in Part 1, the offence can be reduced to three constituent elements:

* The briber must intend to influence the foreign public official in his capacity as foreign public official, even if he does not have authority to use the position in the manner which the briber desires;
* The briber's intention must be to obtain or retain business or a benefit in the conduct of business;
* The briber must directly or via a third person, offer financial or other advantage to the foreign official or to another person at the foreign official’s request.

### Facilitation Payments

With regard to facilitation payments, the Joint Guidance states that they were illegal under the previous regime and remain so under the Act.

#### Public Interest Considerations: Facilitation Payments

The section 6 offence is identified in the Joint Guidance as a "significant policy aspect of the Act". Facilitation payments are mentioned specifically and the public interest factors immediately below are relevant in the context of such payments. However, the Joint Guidance does state that prosecution will generally occur unless the prosecutor is "sure" that there are stronger public interest factors on the side of non-prosecution.

#### Factors favouring prosecution:

* Large or repeated payments are more likely to attract a significant sentence (Code 4.16a);
* Facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated (Code 4.16e);
* Payments may indicate an element of active corruption of the official in the way the offence was committed (Code 4.16k);
* 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.

#### Factors mitigating against prosecution

* A single small payment likely to result in only a nominal penalty (Code 4.17a);
* The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions);
* 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 been correctly followed;
* The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

#### Hospitality and Promotional Expenditure

The Joint Guidance opens this section by explicitly stating that these forms of expenditure are a longstanding and legitimate way of doing business and once they are proportionate, bona fide and reasonable, no action will be taken under the Act. However, such expenditure could amount to a breach of the Act, if it satisfies the criteria under section 1, 6 or 7. As with the Guidance in Part 1 of this newsletter, the Joint Guidance states that all the circumstances will be considered before an inference is taken that an attempt was being made, for example, under section 1 to induce improper performance of a relevant activity. The level of expenditure and hospitality normal in that sector are among the considerations which will be taken into account.

### Section 7: Failure of Commercial organisations to Prevent Bribery

#### The Legal Elements

The legal requirements for this offence have been discussed in detail in Part 1 of this newsletter and will not be repeated here. However the Joint Guidance does note that the offence does not remove direct corporate liability for bribery, which can still be established if it can be shown that a person representing the "directing mind" of the company committed an offence under section 1, 2 or 6.

#### The defence of adequate procedures

As was mentioned in Part 1, the Joint Guidance confirms that an organisation attempting to establish the adequate procedures defence under section 7 must do so on the balance of probabilities. The final determination on adequacy is a matter for the courts.

Furthermore, the Joint Guidance counsels that prosecutors should examine whether or not the adequate procedures defence is likely to succeed when they are at the evidence stage of determining whether or not to proceed with prosecution. This is due to the fact that it is clearly relevant to establish whether or not a good defence exists when trying to collect evidence for the prosecution. In an interesting aside, the Joint Guidance underlines the importance of looking at all the facts of a case when ascertaining whether or not the procedures are inadequate. An isolated act of bribery does not of itself result in a finding of inadequate procedures, particularly if it occurred due to an employee purposefully ignoring very well prepared anti-bribery safeguards, be they contractual or otherwise.

### Section 9: Guidance on adequate procedures

The Joint Guidance states that prosecutors must consider the Guidance when assessing whether or not an organisation’s anti-bribery safeguards are adequate. Additionally, the government commentary on the policy goals underlying sections 1, 2, 6 and 7 of the Act may be useful to prosecutors, according to the Joint Guidance.

### Other public interest considerations

The Joint Guidance states that the factors considered for section 1, in respect of whether or not to prosecute, may be equally applicable to section 7. The Guidance on Corporate Prosecutions should also be consulted.

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1. Defined under section 7 (5) of the Act and discussed later in the newsletter [↑](#footnote-ref-40)
2. Scotland and Northern Ireland constitute separate legal jurisdictions, and as such, the Joint Guidance does not apply to them. However liason with the appropriate officials in these jurisdictions did occur during the preparation of the Joint Guidance. [↑](#footnote-ref-60)
3. See section 10 of the Act. [↑](#footnote-ref-61)