

## COMMERCIAL DISPUTES BRIBERY ACT GUIDANCE

**On 31 March 2011, the Ministry of Justice published its Guidance on the Bribery Act 2010 and set the date for the Act to come into force: 01 July 2011. After that date, commercial organisations will be at risk of the corporate offence of failure to prevent bribery, and will need to have, by then, “adequate procedures” designed to prevent bribery, which, under the Act, will afford a defence.**

The Act is silent as to what ‘adequate’ procedures will look like but required the Government to provide guidance on the point. Following the publication of its draft guidance in September 2010, the Government came under increasing pressure for a review of the Act. There was criticism that the Act went too far, placing companies at unnecessary risk of criminal liability, and tending to stifle business. The Guidance as issued seems intended, in part, to meet these criticisms. It contains not only ‘Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing’ (to give it its full title), but also a commentary on the corporate offence, explaining the policy behind it and how the Government expects the Act to apply in practice. It is something of a balancing act between reassuring businesses on the one hand and upholding the legislation on the other. This article highlights some of the headline topics.

### Hospitality

Alarmists suggested that the entire machinery of corporate hospitality would suddenly be criminalised by the Act. The Guidance emphasises that this was never the Government’s intention: it confirms (as various informed sources have been saying for some time) that “reasonable and proportionate” expenditure is unlikely to engage the SFO’s or the DPP’s attention. It actually instances the entertainment of foreign clients at a Six Nations Match at Twickenham as ‘extremely unlikely’ to be regarded as a bribe.

There is no such exemption – either for Six Nations Rugby specifically, or “reasonable and proportionate” expenditure in general – in the Act. The point is that where expenditure is reasonable and proportionate, it is unlikely to be regarded as evidence of an intention to induce “improper performance”, which is the critical ingredient of ‘commercial’ bribery. The underlying assumption appears to be that the representatives of customers or clients who receive reasonable and proportionate hospitality will still exercise their judgment properly in awarding contracts, and the providers of such hospitality do not intend anything else.

Even so:

- > the fact that a payment is reasonable and proportionate will not prevent a prosecution or conviction if there is positive evidence that the payer intended to induce improper performance, even if the benefit was modest;
- > commercial organisations will still need to set criteria for hospitality payments in their anti bribery procedures.

### Bribery of Foreign Public Officials

What many found objectionable about this new offence is that the prosecution does not have to show an intention to induce any improper performance on the public official’s part. A person who makes a payment (or the offer or provision of some other financial advantage) to a Foreign Public Official, intending to obtain or to retain business or a business advantage commits an offence (unless the official is required or permitted by local written law to receive the benefit). This is sweeping; nothing else need be proved.

The Guidance explains the Government’s position as follows:

the requirement of an intention of improper performance was excluded because, in countries where corruption is rife, it would be very difficult for the prosecution to prove what a local official’s functions actually were. In other words, the Guidance appears to suggest that defining the offence broadly is a lesser evil than risking that justifiable prosecutions would be stymied because of such evidential difficulties;

- > nonetheless, the Act is only intended to bite where the mischief of actual or intended improper performance has arisen;
- > the prosecution would need to show a ‘sufficient connection’ between the payment and the intended business advantage.

The suggestion is that ‘business advantage’ will be interpreted quite narrowly. The provision of benefits which simply help to maintain a relationship is unlikely to be regarded as intended to generate business as such, or obtain a business advantage; there will need to be evidence that the benefit was intended to have ‘a direct impact on decision making’.

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i.e. as opposed to bribery of foreign government officials.

The Guidance goes on to give as an example an expenses paid trip by Government officials to a remote mining facility intended to demonstrate a company's safety standards as falling outside the intended scope of the offence; as would fringe benefits such as fine dining and sports matches on an overseas trip, if the trip can otherwise be justified.

This seems to be intended to align bribery of Foreign Public Officials more closely with the criteria applicable to commercial bribery, but again 'adequate procedures' will have to address this area.

### Facilitation payments

The Guidance accepts that in many places small bribes to facilitate government action are a fact of life which cannot be eradicated without a culture shift. However, the Act is part of the global attempt to bring about such a shift, and the Guidance makes no attempt to limit the Act's application to facilitation payments. Rather, the expectation is that businesses' procedures will provide for facilitation payments to be challenged and resisted: one of the Case Studies annexed to the Guidance proposes that companies should build into their delivery schedules an allowance for the time it will take to challenge and deal with demands for facilitation payments.

The Guidance does acknowledge that the Act is drawn widely enough to catch payments obtained by extortion, and points out that an individual who makes a facilitation payment under pressure may well have a defence of duress.

Beyond that, it will be a matter of prosecutorial discretion, and the Guidance cross-refers to the 'Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions', published the day before the Guidance itself. If there is *prima facie* evidence of a facilitation payment (or indeed any other form of bribe) prosecutors must, as the second stage in their decision making, consider whether prosecution is in the public interest. Factors against prosecution include the existence of an anti-bribery policy that is normally adhered to, pro-active reporting of the payment and an element of duress: factors in favour include large or repeated payments, and evidence that facilitation payments are accepted as a normal feature of business, or that anti-corruption policies are flouted.

The message is that while Government and prosecutors are well aware of the realities of life on the ground, a commercial organisation's anti-corruption procedures will nonetheless be expected to tackle facilitation payments effectively.

### Adequate procedures - proportionality

As in the draft version, the Guidance remains high level and outcome focused, although there is a degree more substance in the final version. There remain six principles, but the old

Principle 4 - that policies should be 'clear, practical, accessible and enforceable' - has been transformed into a new Principle 1, namely that a commercial organisation's procedures will be "proportionate" to the risks it faces and the nature, scale and complexity of its activities.

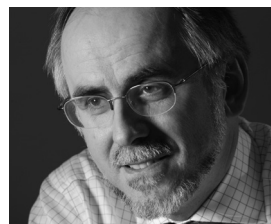
This new concept of proportionality appears to be a response to the complaints of compliance overload but, of course, it places a premium on the carrying out of a risk assessment in drawing up anti-bribery procedures (a principle carried over from the draft guidelines). Without such an assessment, it will be difficult for a commercial organisation to show that its procedures are proportionate and therefore adequate.

Otherwise, the principles remain as already trailed: top level involvement, due diligence on business partners, effective communication of the procedures, and monitoring and improvement. There will be no substitute for a careful review of the Guidance itself and its application to the business in question. Helpfully, the principles are illustrated by Case Studies supplementing the pointers in the principles themselves as to how they might apply in practice.

Not surprisingly, the Guidance is hedged with warnings that it is not prescriptive; in any prosecution, it will be for the defendant company to satisfy the court that, in the particular circumstances of the case, its procedures were adequate. Compliance (or non-compliance) with the Guidance will not necessarily be determinative either way. However, it is bound to function as the primary yardstick, not only at trial, but equally if not more importantly, at the investigation stage, when the prosecutors are considering whether it is in the public interest to proceed.

As the Guidance is at pains to point out, the intention of the Act is not to criminalise ethically run organisations which face isolated instances of bribery. The flip side is that such organisations will have to have adequate anti-corruption procedures in place, and the countdown has begun.

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