



Ministry  
of Justice

# **Bribery Act 2010: Post Legislative Scrutiny Memorandum**

June 2018

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of Justice

## **Bribery Act 2010: Post Legislative Scrutiny Memorandum**

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

June 2018



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## Contents

<b>Bribery Act 2010: Post Legislative Scrutiny Memorandum</b>	<b>3</b>
<b>1. Origins of the Act</b>	<b>4</b>
<b>2. Policy Objectives</b>	<b>6</b>
(i) Consolidation and modernisation of the law	6
(ii) A robust and effective enforcement tool with global reach	6
(iii) Corporate good governance	8
(iv) Prosecution policy	8
<b>3. Provisions of the Act</b>	<b>10</b>
(v) The general offences	10
Section 1 – the offences of bribing another person	10
Section 2 – the offences relating to being bribed	11
Section 3 – the function or activity to which the bribe relates	12
Section 4 – Improper performance to which the bribe relates	13
Section 5 – Expectation test	13
Section 6 – Bribery of foreign public officials	14
Section 7 – Failure of commercial organisations to prevent bribery	15
Section 8 – Meaning of associated person	16
Section 9 – Guidance about commercial organisations preventing bribery	17
Section 10 – Consent to prosecution	17
Section 11 – Penalties	17
Section 12 – Offences under the Act: territorial application	17
Section 13 – the Defence for certain bribery offences	18
Section 14 – Offences under sections 1, 2 and 6 by corporate bodies	18
Section 15 – Offences under section 7 by partnerships	18
Section 16 – the Application to Crown	18
Section 17 – Consequential provision	18
Section 18 – Extent	18
Section 19 – Commencement and transitional provisions	19

<b>4. Implementation of the Act and Guidance</b>	<b>20</b>
(vi) The development of the Ministry of Justice Guidance	20
(vii) Ministry of Justice Guidance	20
(viii) Bribery Act awareness raising	23
(ix) Business response to the Act, guidance and awareness raising	25
<b>5. Enforcement of the Act</b>	<b>27</b>
(x) Prosecution guidance	28
(xi) Cases under section 7 of the Bribery Act (corporate failure to prevent)	28
(xii) Deferred Prosecution Agreements	29
(xiii) The 'self-report' regime in Scotland	31
<b>6. Legal Issues</b>	<b>33</b>
<b>7. Preliminary Assessment</b>	<b>34</b>

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## **Bribery Act 2010: Post Legislative Scrutiny Memorandum**

1. This memorandum has been prepared by the Ministry of Justice (“the Department”) for submission to the Ad Hoc Select Committee for the Post Legislative Scrutiny of the Bribery Act 2010 (“the Committee”). It is published as part of the process set out in the document Post-Legislative Scrutiny – The Government’s Approach (Cm 7320).
2. The memorandum summarises the provisions and implementation of the Bribery Act 2010 (“the Act”) in relation to England and other Devolved Administrations where appropriate, but provides the Committee with the Department’s preliminary assessment of the Act as applied to England only.

## 1. Origins of the Act

3. The Bribery Act 2010, which came into force on 1 July 2011, was the product of a considered reform process. The international consensus against bribery, which developed in earnest in the 1990s, was the result of the recognition among statesmen, parliamentarians, international organisations, prosecutors, the legal profession, police forces, the media, civil society and many in the international business community, that bribery had become a substantial global problem that needed to be urgently addressed. Bribery is a serious crime that has far reaching economic and social consequences. It corrupts the ethical values upon which the operation of our society and institutions are founded and is particularly damaging in developing and emerging economies. Bribery hampers economic development, sustains poverty, and challenges the proper rule of law. It is market distorting, creating unfair and expensive barriers for legitimate business.
4. Many in the global community looked to the UK to play a leading role in the fight against bribery and corruption. It was plain to many by the time the first international instrument was agreed in 1998 (the OECD Convention on bribery of foreign public officials in international business transactions) that our law, which was fragmented and largely antiquated, was commensurate neither with the UK's international standing, nor with its aspirations to play a leading global role in the fight against bribery.
5. The international consensus continued to gather momentum with the agreement of further Conventions such as the Council of Europe Criminal Law Convention on corruption (adopted in 1999) and the United Nations Convention against Corruption (adopted in 2003). The OECD, the UN and the Council of Europe, each developed formal mechanisms of peer review to monitor compliance with the terms of their instrument. The OECD Bribery Working Group monitored compliance with the OECD convention, which the UK ratified in 1998. From 2002 this group raised a number of critical questions about UK law, particularly as regards corporate criminal liability for bribery.
6. The reform process in the UK coincided, therefore with the development of the international consensus. The Law Commission first made proposals for reform of bribery in a 1998 report (*Legislating the Criminal Code: Corruption*, Report No. 248). This led to the publication of a draft Corruption Bill in 2003 (*Corruption Draft Legislation Cm 5777*), but this Bill failed to win broad support in pre-legislative scrutiny; one of the problems being that there was no agreement on how to define bribery for the purposes of the criminal law. It was decided to refer the matter back to the Law Commission for a further review. The Law Commission was given broad terms of reference allowing them to consider the full range of options for consolidating and reforming the law on bribery, including proposals for reform of the law governing corporate criminal liability for bribery. The Law Commission issued a consultation paper, *Reforming Bribery* (Consultation Paper No. 185), in October 2007 and its report *Reforming Bribery* (Report No. 313) on 20 November 2008, which included a draft Bill. The Government presented a draft Bribery Bill, (Cm 7570), which differed in some respects from the Law Commission's Bill, to Parliament on 25 March 2009 for pre-legislative scrutiny. This reported on 28 July 2009 (*Joint Committee on the Draft Bribery Bill, First Report, Session 2008-09*, HL115, HC430 – I & II). The Bribery Bill, subject to further amendment to reflect the findings of the pre-legislative scrutiny



committee, was subsequently introduced in Parliament in late 2009. This Bill received broad cross-party support and, the Act received Royal Assent in April 2010, just before the prorogation of Parliament for the general election that brought in the coalition Government. Section 9 of the Act requires the Secretary of State to publish guidance to commercial organisations about preventing bribery. The coalition government undertook a consultation exercise on the guidance, which was published in March 2011; three months before the Act came into force on 1 July 2011.

## 2. Policy Objectives

7. In broad terms there were four policy drivers that influenced the content of the Bribery Act.

### (i) Consolidation and modernisation of the law

8. The law that the Bribery Act replaced was old and fragmented. This brought with it some inconsistencies and made the provision difficult for the courts to apply. The old law included a common law offence of bribery, which dealt only with bribery in the public sector. The statutory provision comprised the Public Bodies Corrupt Practices Act 1889, again confined to public sector bribery and the Prevention of Corruption Acts of 1906, which included provision for both the public and private sectors, and the Prevention of Corruption Act 1916, which created a presumption of corruption if certain conditions were met. These three Acts are often referred to collectively as the **Prevention of Corruption Acts, 1889 to 1916**. The inadequacies of the common law offence and the statutory provision (amended to extend the jurisdiction of the courts extraterritorially by the Anti-Terrorism, Crime and Security Act 2001) were fully considered before and during the Bribery Act legislative process and do not need to be rehearsed here. Suffice to say that one of the important aims of the Bribery Act was to replace this old law with a consolidated modern law that provided prosecutors and the courts the tools they need to tackle bribery in the 21<sup>st</sup> Century.
9. The Act relies on the two general offences and the offence of bribery of a foreign public official to consolidate, reformulate and modernise existing law. These offences did not extend the scope of the law in any significant way but rather expressed the existing scope with far more clarity and precision, using more modern language. The Act contains two offences that deal with the generality of bribery offending. One of these general offences deals with 'active' bribery (offering, promising and giving of bribes) the other with 'passive' bribery (requesting, agreeing to receive or accepting bribes). These general offences address bribery of all kinds in the both the public and private sectors. The offences are based on the concept that bribery is an inducement to perform a function improperly. A good portion of the Act is devoted to defining what amounts to an improper performance.
10. The offence of bribery of a foreign public official was specifically designed to address the problem of the corruption of decision making in respect of publicly funded business opportunities overseas. This offence differs from the general offences in that it is not based on an improper performance test but catches bribes intended to influence a foreign public official and thereby obtain or retain business.

### (ii) A robust and effective enforcement tool with global reach

11. The Bribery Act was designed to be robust mainstream criminal law throughout. This objective is illustrated by the broad scope of the two general offences and the offence of bribery of a foreign public official, the maximum penalty for those offences of 10 years' imprisonment (an increase from the previous maximum for the statutory offences of 7 years) and a new, innovative and simple form of corporate liability.

12. As described in the previous chapter the threats posed by international bribery are global. It was clear that the Act needed to have global reach. The Act provides extraterritorial jurisdiction for the two general offences and the offence of bribery of a foreign public official in respect of offences committed overseas by UK nationals and non-UK nationals who are ordinarily resident in the United Kingdom. This includes jurisdiction over offences committed overseas by a UK corporate entity or “legal person”, where attribution of criminal liability is governed by the existing common law rules.
13. From an economic perspective bribery inhibits the ability of UK companies to compete overseas on a level playing field. Once bribery takes hold, fair and competitive markets disappear. It is in our national security and economic interests, for UK to engage in the international fight against bribery, along with all the countries voicing support for the fight in the international fora and adhering to uniform standards. The ability of our companies to compete on a global scale is obviously key to our continued economic strength. It was an important Bribery Act policy objective therefore to provide our prosecutors and investigators with an effective, clear, modern, robust law with global reach that addressed commercial bribery. Commercial bribery overseas on the part of individuals will fall within the scope of the general offences and the offence of bribery of a foreign public official. As indeed may some that is perpetrated on behalf of companies in pursuit of their overseas business objectives. Such liability of companies would, however, be based on criminal conduct orchestrated by those at the corporate centre under the existing common law rules governing the attribution of corporate liability, known as the “identification doctrine”. It is these very rules that had attracted challenge from the OECD amongst others. The Government took the view that the current law was inadequate to achieve the policy objective of addressing corporate commercial bribery effectively and legislated to provide a new innovative law. This emerged as the offence of failing to prevent bribery and is the only provision in the Act that represents a significant extension of the scope of the law on bribery.
14. The failure to prevent corporate liability was a new concept in UK law. The failure to prevent offence is not a substantive bribery offence. A guilty company is not convicted of a substantive offence of bribery, as they would be if found guilty using the identification doctrine, but of failing to prevent bribery. It remains possible for corporate bodies to be convicted of substantive offences under section 1, 2 and 6, applying the identification doctrine. Because the failure to prevent offence at section 7 of the Act overcomes the principle challenge of the identification doctrine by not requiring proof of a fault element at the corporate centre, it was anticipated, however, that the failure to prevent offence would establish itself as the norm for corporate bribery prosecutions.
15. Section 7 of the Act created a form of strict liability. If a person associated with a company bribes in pursuit of the business objectives of the company then the company is prima facie guilty of the offence. The Government, however, recognised the realities of commercial bribery prevention and in particular the fact that most robust internal measures to prevent bribery cannot prevent unethical practices on the part of those representing businesses who are determined to use them to further a company’s business objectives. The offence is therefore matched with a full defence if the company in question can show that, despite the instant offence, it has “adequate” bribery prevention procedures in place.
16. In order to endow the section 7 offence with global impact, the Act confers wide jurisdiction. The offence catches bribery anywhere in the world on behalf not only of

UK companies but foreign companies carrying on a business in the UK, even if the bribery relates to a business transaction that has no connection to the UK. The wide jurisdiction the Act affords our prosecutors and courts in the global fight against bribery has been noted overseas.<sup>1</sup> In addition, in contrast to the US legislation, the Act makes no exemption for the payment of small bribes intended to induce a person in an official position to undertake a routine function that is no more than what he or she is expected to do as part of their job (so called “facilitation payments”).

### **(iii) Corporate good governance**

17. From the beginning, when the failure to prevent offence was being developed as a proposal for legislation at the Law Commission, it was recognised that, although the offence was developed and included in the Bribery Act as mainstream criminal law, that it had potential to have a quasi-regulatory impact. A significant aspect of the Government’s policy objectives with section 7 was its role in incentivising businesses to contribute to the fight against corruption through the implementation of bribery prevention procedures.
18. Many UK and foreign businesses operating in the UK, with global interests had already addressed bribery prevention, in part as a response to the reach of the US Foreign Corrupt Practices Act.<sup>2</sup> The Bribery Act offence, coupled with the full adequate procedures defence, was designed to encourage the business community to maintain the momentum in incorporating bribery prevention as an essential part of corporate good governance. The aim was, and still is, to encourage not to oblige.
19. Ultimately it is for the courts to provide the interpretation of key terms used in legislation. In the case of the Bribery Act this basic premise holds but in view of the innovative nature of failure to prevent offence the Government accepted during the passage of the Bribery Bill that guidance to assist business in their approach to bribery prevention for the purposes of the defence to section 7 was necessary. The Act requires the Secretary of State to publish such guidance. Guidance was published in March 2011.

### **(iv) Prosecution policy**

20. The Legislative framework is only part of the picture of course. The Bribery Act was designed to dovetail with a policy developed by the enforcement agencies, in particular the Serious Fraud Office (“SFO”). This policy acknowledges the serious nature of the offence of bribery and that there will be those cases in which a prosecution is unavoidable, but also employs the framework provided by the section 7 offence and the adequate procedures defence to promote cooperation with the authorities on the part of businesses that face allegations of bribery.

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<sup>1</sup> “The significant extension of SFO’s jurisdictional reach, reminiscent of the U.S. FCPA, is what makes the Act a landmark piece of legislation in the battle against corruption.” (Research Report of the US Law Library of Congress - <https://www.loc.gov/law/help/uk-bribery-act.php>)

<sup>2</sup> The Foreign Corrupt Practices Act 1977 <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

21. Prosecution policy is set out in joint prosecution guidance on the Bribery Act 2010.<sup>3</sup> As regards corporate liability for bribery the policy is to encourage organisations that discover that a bribe has been paid on its behalf to self-refer the matter to the authorities and co-operate fully with the investigation. In circumstances where a business cooperates fully and transparently with the authorities and discloses the full extent of the offending conduct a just outcome does not necessarily require a criminal conviction. Before 2014 this invariably meant that the SFO would in the appropriate circumstances rely not on criminal proceedings but on civil proceedings under Part V of the Proceeds of Crime Act 2000 to recover the value of any business obtained by bribery. In April 2014, however, the scheme providing for Deferred Prosecution Agreements (“DPAs”) in respect of economic crime introduced by the Crime and Courts Act 2013 came into force. Since then the SFO has used DPAs in appropriate cases where the corporate has demonstrated genuine cooperation and a willingness to reform and where a DPA would be in the interests of justice.
22. In the manner described above the policy objective of the Bribery Act was, therefore, to combine robust enforcement tools with mechanisms that promoted better corporate good governance. The measures taken in support of this policy during the implementation of the Act is dealt with in Chapter 4.

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<sup>3</sup> Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions – <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>

### 3. Provisions of the Act

#### (v) The general offences

23. Sections 1 to 5 of the Act set out the “active” and “passive” bribery offences that are of general effect and the required definitional provision. Each offence is divided into “cases”. There are two cases for the active bribery offence at section 1 and four for the passive bribery offence at section 2.

#### Section 1 – the offences of bribing another person

24. This section describes the offence of bribery as it applies to the person doing the bribing. Case 1 has two alternative variants, dealing with an advantage that is intended in the first formulation to induce an improper performance or, in the second, to reward an improper performance. Case 2 has one formulation only; where the person knows or believes that acceptance of the financial advantage would constitute improper performance itself.

##### Case 1 (section 1 (2))

25. This case deals with circumstances in which the offer, promise or giving is made (either directly or through a third party<sup>4</sup>) with the intention that it induces a person (it does not have to be the person offered, promised or given the advantage<sup>5</sup>) to perform improperly a relevant function or activity or that it rewards a person for such a performance.

26. Neither of the two variant formulations of Case 1 require the prosecution to prove the passive counterpart to the active conduct offence; the passive counterpart may have not occurred in that it was not in fact an improper performance. Where evidence of the relevant conduct that amounts to an improper performance is available, however, the prosecution may in practice, adduce it as it is likely to be of probative value in respect of the required intent to induce or reward an improper performance.

##### Case 2 (section 1(3))

27. This case deals with circumstances in which the offer, promise or gift of an advantage is made (either directly or through a third party<sup>6</sup>) to a person in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity. In this case there can be no person “other” than the intended passive actor.

28. The prosecution need to prove that the defendant knew or believed that the acceptance of the advantage would in itself amount to an improper performance. In the absence of such knowledge or belief the offence would catch an entirely innocent

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<sup>4</sup> Section 1(5)

<sup>5</sup> Section 1(4)

<sup>6</sup> Section 1(5)

offer, promise or giving of a gift that is intended, for example, as a mark of mutual respect.

29. The meaning of financial or other advantage is left to be determined by the courts, but the nature of the function or activity is addressed in section 3, and improper performance is defined in sections 4 and 5.

## **Section 2 – the offences relating to being bribed**

30. This section describes the offence of bribery as it relates to the person who is receiving, or potentially receiving a bribe. There are four cases describing the relevant behaviour.

### Case 6 (section 2(5))

31. It is convenient to start with the last case because this Case contains the “classic” bribery case scenario. This case has two variant formulations. “In consequence of” variant and the “in anticipation of” variant.
32. The “in consequence of” variant is the “classic” case scenario for a bribery offence. This case concerns circumstances that can be described as the recipient of the bribe (“R”) doing an improper favour for the briber payer (“P”) in return for an advantage. The factual scenario is:
- (i) an improper performance by R, or another person at R’s request or with R’s assent or acquiescence;
  - (ii) R’s request, agreeing to receive or accepting a financial or other advantage; and
  - (iii) (i) was a consequence of (ii).
33. The “in anticipation of” variant differs from the “in consequence of variant” in that the improper performance has taken place but the request, agreement to receive or acceptance of the advantage has not. The factual scenario is:
- (i) the improper performance by R or another person at R’s request or with R’s assent or acquiescence; and
  - (ii) that this performance was in anticipation of R requesting, agreeing to receive or accepting the advantage.

### Case 5 (section 2(4))

34. This case can be regarded as a more developed version of the previous Case 6 “in anticipation of” variant. Here, both the improper performance element and the request, agreement to receive or acceptance of an advantage element have taken place, with the former having predated the latter. The factual scenario is:
- (i) the improper performance by R or another person; and
  - (ii) that R requests, agrees to receive or accept the advantage
  - (iii) as a reward for (i).

### Case 4 (section 2(3))

35. This Case involve circumstances in which only the request, agreement to receive or acceptance of an advantage takes place where this is in itself an improper performance of a relevant function or activity. The factual scenario therefore is:

- (i) R requests, agrees to receive or accept the advantage; and
- (ii) the request, agreement or advantage itself constitutes an improper performance by R (no other person can be contemplated here).

36. In all of Cases 4, 5 and 6, it is immaterial whether or not R, (or in Cases 5 or 6 the other person performing function improperly), was aware that their conduct amounted to an improper performance. There is ample justification for finding R guilty of bribery where both the basic transactional and the wrongfulness elements have been fulfilled.

### Case 3 (section 2(2))

37. In this case the request, agreement or acceptance of an advantage has taken place but the improper performance of a relevant function has not, in circumstances in which the request, agreement or acceptance is not in itself an improper performance. The factual scenario is:

- (i) R requests, agrees to receive or accepts a financial or other advantage;
- (ii) with intent on the part of R that, in consequence, a relevant function or activity should be performed improperly by R or by another person.

38. The specific intent is necessary in this Case because otherwise R would be guilty of bribery for requesting, agreeing to receive or accepting any advantage from anyone for any entirely legitimate purpose.

39. Note that in all the above cases (3 to 6) it is immaterial whether R requests, agrees to receive or accepts and advantage (or is to do so) directly, him or herself, or through a third party intermediary.<sup>7</sup> It is also immaterial whether any advantage is or is intended to be for the benefit of R or another person.<sup>8</sup>

40. As with section 1, the nature of the function or activity is addressed in section 3, and improper performance is defined in sections 4 and 5.

### **Autonomous offences**

41. Neither the section 1 nor section 2 offence require proof of the counterpart passive or active elements respectively. They are therefore autonomous offences. In practice, however, evidence of the counterpart conduct will be relied on in order, for example, to prove any required intent.

### **Section 3 – the function or activity to which the bribe relates**

42. This section defines the relevant functions or activities to which an improper performance relates. Its purpose is to ensure that the law of bribery applies equally to public and private functions without discriminating between the two. It also encompasses activities performed outside the UK and even activities with no link to this country.<sup>9</sup>

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<sup>7</sup> S. 2(6)(a)

<sup>8</sup> S. 2(6)(b)

<sup>9</sup> S. 3(6)



43. This section provides that the bribery general offences cover any function of a public nature, any activity connected with a business, including trade or profession, any activity performed in the course of a person's employment, or any activity performed by or on behalf of a body of persons either corporate or unincorporated. In order to fall within the scope of the Act these functions and activities must be subject to at least one of three conditions. These conditions are that the person performing the function or activity is expected to be carrying it out in good faith, or with impartiality, or that an element of trust applies to their role.<sup>10</sup>
44. This provision of the functions and conditions at section 3 confines the general offences to the traditional scope of bribery offences. The section 6 bribery of a foreign public official offence is concerned with activities connected with business. The Act does not therefore cover private functions or activities, so as to avoid, for example, the possibility of the Act being used to uphold received moral standards in family life.

#### **Section 4 – Improper performance to which the bribe relates**

45. The relevant functions and activities having been established in section 3, section 4 goes on to define what will amount to an improper performance on those functions or activities. The section achieves this through the concept of a breach of a relevant expectation that attaches to a function or activity subject to one of the three conditions set out at section 3(3) to (5). The section of course covers improper performance of current functions but also covers past functions,<sup>11</sup> so as to be able to deal with circumstances in which a person acts improperly in reliance on influence arising from a function or activity they performed in the past.
46. The definition of an improper performance embraces both breaches of the relevant expectations through both acts and omissions.<sup>12</sup> As regards functions or activities subject to a condition that they are performed in good faith or impartially (conditions A & B) the relevant expectation is simply that they are performed in a manner consistent with those notions. In the case of functions or activities that are subject to the condition that the person performing them is in a position of trust (Condition C) the relevant expectation is any expectation as to the way, or the reasons for which, the functions or activities are performed.

#### **Section 5 – Expectation test**

47. The global reach of the Bribery Act means that in some cases a court will have to consider whether there has been a breach of expectation by a person performing a relevant function or activity overseas. The question then arises as to which prevailing standards should apply. The Act reflects the view that a UK citizen or non-national resident accused of bribery overseas should be subject to a UK centric test. This section provides that what would be expected is that which a reasonable person in the UK would expect of a person performing such a function or activity.
48. In addition, when the allegation is one of bribery overseas, in so deciding what a reasonable person in the UK would expect by way of performance a court must disregard any local custom or practice, unless it is permitted by "written law", either

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<sup>10</sup> S. 3(3), (4) and (5)

<sup>11</sup> S. 4(3)

<sup>12</sup> S. 4(1)(b)

statutory or judge made. This is to prevent a person avoiding liability by claiming that the giving of an advantage in return for the performance of a function or activity was expected of him or her as part of local culture. It should be borne in mind, in this context, that the Bribery Act does not prohibit genuine gift giving.

## **Section 6 – Bribery of foreign public officials**

49. The background to the creation of this offence was concerns about difficulties that are often faced by prosecuting authorities in establishing the full circumstances surrounding negotiations between foreign governments and non-local businesses seeking publicly funded contracts. It was considered that proof of bribery as an inducement of an improper performance would very likely amount to a serious impediment to holding companies that use bribery to pursue business objectives overseas to account. The offence at section 6 is therefore modelled differently and is based on the notion of advantages offered, promised or given to influence another person in the way they discharge their official duties.
50. The offence is an active bribery only offence, it does not criminalise the passive conduct on the part of the official, but is broad in scope. An offence is committed<sup>13</sup> if a person, directly or indirectly, promises or offers or gives any financial or other advantage to a foreign public official with the intention of influencing the performance of their official function. The person offering the advantage must also intend to obtain or retain a business advantage in so doing. There is no requirement that the advantage be undue or not legitimate.
51. The offence is provided with a wide definition of a foreign public official, which embraces any person who holds any legislative, administrative or a judicial post, or anyone carrying out a public function, whether appointed or elected. The definition also embraces the exercising of functions for state owned enterprises and any public agency. In addition, an official or agent of an international organisation is also deemed to be a public official for the purposes of this offence.
52. The offence catches omissions<sup>14</sup> as well as acts and covers advantages that are intended to influence the use of an official position even where that is not formally within the authority of a person holding that post.<sup>15</sup> The offence does not, however, cover an advantage that is proffered to influence a public official where that official is permitted or required by the written law<sup>16</sup> to be influenced by the advantage. Tenders for large scale infrastructure and industrial contracts, and the regulations governing them, in foreign countries will often include the ability of those tendering to offer additional community benefits alongside their tender for the main contract. This permitted or required provision<sup>17</sup> therefore prevents the offering of such benefits amounting to an offence under this section.
53. As mentioned in Chapter 2 the offences at sections 1, 2 and 6 modernised and clarified the scope of the law. They did not significantly extend the conduct that the law

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<sup>13</sup> S. 6(3)

<sup>14</sup> S. 6(4)(a)

<sup>15</sup> S. 6(4)(b)

<sup>16</sup> S. 6(7)

<sup>17</sup> S. 6(3)(b)

criminalised. The innovative part of the Act, which did create new law was the corporate offence of a failure of a commercial organisation to prevent bribery.

### Section 7 – Failure of commercial organisations to prevent bribery

54. The background to the creation of this offence is dealt with in Chapter 1 and 2. The detail of its implementation is set out in Chapter 4.
55. This section creates an offence of failing to prevent bribery, which can only be committed by a relevant commercial organisation, defined as a UK incorporated company or partnership formed in the UK, whether its business is carried out in the UK or elsewhere; or a company incorporated or partnership formed elsewhere, which carries on a business, or part of a business in the UK.<sup>18</sup> It must be noted that, whilst the Act defines UK partnerships for the purposes of section 7, it uses very flexible language on the character of similar entities formed under the law of foreign countries. In addition, the Act is silent on the meaning of incorporation in recognition that the rules on this concept will vary around the world.
56. This section also provides that the definition of business includes a trade or profession, including what is done during the course of a trade or profession. An offence is committed under this section if a person associated with the relevant organisation (as defined in **Section 8**) bribes another person in order to retain or obtain business or advantage.
57. A bribe for these purposes is conduct that would amount to an offence under section 1 or 6 of the Act; i.e. active bribery (passive bribery is recognised in all but rare cases as a means of personal rather than corporate enrichment). It is not necessary for the person associated with the commercial organisation to be prosecuted. Indeed, it would, in many instances, be impossible to prosecute such an offence where it occurred overseas because the jurisdiction for the offences at section 1 and 6 is extended extraterritorially only in respect of those committed by UK nationals or non-nationals resident in the UK. In practice it will be non-UK nationals and residents perpetrating bribery on behalf of commercial organisations overseas. For these reasons the jurisdictional provision at section 12(2)(c) and (4) is disapplied for the purposes of section 7;<sup>19</sup> meaning that the nationality of the briber is immaterial to the commission of the offence by the commercial organisation.
58. Given, that an offence is committed under this section no matter where the relevant conduct takes place,<sup>20</sup> the section 7 offence is endowed with extraordinary scope. The section would catch, for example, a bribe paid in Sweden, by a Philippine national on behalf of a Brazilian engineering company, that carries on a lift maintenance business in the UK, in respect of a contract relating to an infrastructure project in New Zealand. The extent to which such a case could be prosecuted in a UK court in practice is of course an entirely different matter.
59. If the predicate facts as described above are proved then the commercial organisation in question is prima facie guilty of the offence, irrespective of the extent of knowledge, awareness or intent in respect of these facts at the corporate centre. The section,

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<sup>18</sup> See Chapter [5] for discussion of meaning.

<sup>19</sup> S. 7(3)(a)

<sup>20</sup> S. 12(5)

therefore, creates a form of strict liability. This is one of the key differences between the Law Commission draft Bribery Bill and the Bill as introduced into Parliament. The Law Commission's proposed failure to prevent offence, which was modelled in part on the standard precedent for EU corporate liability obligations, also required proof of negligence on the part of the company, was criticised during pre-legislative scrutiny.

60. This strict liability is however subject to a full "due diligence" defence. The commercial organisation in question will not be guilty if it can show that despite the instant offence it has put "adequate" procedures in place designed to prevent bribery on the part of those associated with it. The burden of proof is thereby shifted to the defendant company to prove to the civil standard.

### **Section 8 – Meaning of associated person**

61. This section sets out the meaning of "associated person" for the purpose of **section 7**. Under this provision a person is associated with a commercial organisation if he or she performs services for it, regardless of the capacity in which they perform those services i.e. as an employee, agent or subsidiary.

62. In determining whether a person is associated with a commercial organisation a court will examine all the surrounding circumstances and will look behind the nature of the formal relationship between the person and company; save for the fact that if the person is an employee, then it is presumed that he or she performs services for the organisation unless proved otherwise.

63. For the purposes of this section the performance of services for a company cannot include the service of being involved in the bribe in question.<sup>21</sup> This provision means that a person who is hired solely for the purposes of the payment of a bribe would be an intermediary and fall outside the scope of the meaning of "associated" for the purposes of section 7. In such circumstances the role of "associated" person will be performed by the person who recruited the intermediary.

64. It should also be noted that the role of an associated person may also be fulfilled by another company, such as subsidiary of the commercial organisation in question. Thus, for example, a UK subsidiary of a large foreign owned multi-national company could arrange a bribe on behalf of its parent company not only in the UK but elsewhere in the world and thereby fulfil the role of "associated" person in a section 7 offence committed by the parent company. The role could be conversely fulfilled by a parent company arranging a bribe in order to obtain business for one of its subsidiaries.

65. Finally, the "associated" person could also be a person holding a high managerial role in the commercial organisation in question. Such circumstances would raise issues as to whether the company in question could be prosecuted for a substantive bribery offence in reliance upon common law rules of attribution (identification doctrine), but the section does not exclude relevant conduct on the part of those at the corporate centre.

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<sup>21</sup> S. 8(1)

### **Section 9 – Guidance about commercial organisations preventing bribery**

66. This section was included in the draft Bill by way of Government amendment, following debate on the section 7 offence. It provides that the Secretary of State for Justice must publish guidance about the procedures that relevant organisations can put in place to prevent associated persons committing bribery offences on their behalf for the purposes of section 7.
67. Pursuant to this section the Ministry of Justice published guidance in March 2011, three months before the Act was commenced on 1 July of that year. The guidance sets out a principled outcome focus approach to corporate bribery prevention. The guidance is considered in detail in the next chapter of this memorandum entitled Implementation of the Act and Guidance.

### **Section 10 – Consent to prosecution**

68. This section provides that proceedings for bribery offences under this Act require the consent of either the Director of the SFO, the Director of Public Prosecutions (DPP), or the Director of the Revenue and Customs Prosecutions, or equivalents of the first and second of those posts as regards cases in Northern Ireland. The reference to the post of Director of Revenue and Customs prosecutions is now anachronistic because the role has been subsumed into that of the DPP.
69. Note the consent required is personal non-delegable,<sup>22</sup> save where the Director concerned is unavailable, due for example to ill health or foreign travel. Even then, however, the person who gives consent to a prosecution must have been designated personally by the Director in question.<sup>23</sup>

### **Section 11 – Penalties**

70. This section sets out the penalties for breaching the provisions of the Act. The offences at sections 1, 2 and 6 are either way offences. Individuals guilty of an offence under sections 1, 2 or 6 are subject upon summary conviction to a fine up to the statutory maximum and a term of imprisonment up to 12 months; or both. Those convicted under section 1, 2 or 6 upon indictment are subject to an unlimited fine or a term of imprisonment of up to 10 years; or both.
71. The section 7 offence is indictable only and convicted commercial organisations (or “persons”) are therefore subject to an unlimited fine.

### **Section 12 – Offences under the Act: territorial application**

72. This section provides the jurisdictional provision of the Act. First this section provides what is often referred to as “in whole or in part” jurisdiction. This provision covers, for example, circumstances in which a bribe is paid into bank accounts in the UK from overseas by a person who whilst overseas forms the necessary intent that this induces an improper performance in the UK.
73. Where the conduct that would constitute an offence if it occurred in the UK in fact occurs entirely outside the UK our courts will have jurisdiction where the conduct is on

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<sup>22</sup> S. 10(4) and (7)

<sup>23</sup> S. 10(5)

the part of a person with a “close connection” to the UK. A “close connection” will be present when a person is one of the various listed forms of UK nationality, is incorporated in the UK or is a Scottish partnership, or is a Scottish limited partnership, or is a non-UK national individual ordinarily resident in the UK. As previously explained, for jurisdictional purposes, it is immaterial where a section 7 offence takes place.<sup>24</sup>

### **Section 13 – the Defence for certain bribery offences**

74. This section provides a statutory defence for the intelligence services or armed forces when engaging in legitimate functions that may require the use of financial or other advantage, if it can be proven that a relevant bribery offence was necessary.

### **Section 14 – Offences under sections 1, 2 and 6 by corporate bodies**

75. This section concerns circumstances in which a company is convicted of an offence under sections 1, 2 or 6 in reliance on the common law rules of attribution of corporate criminal liability (the identification doctrine). It does not concern circumstances in which a commercial organisation is convicted under section 7 of the Act.

76. This type of provision is quite common in modern criminal law statutes. Where a company is prosecuted for a serious offence that requires proof of intent in reliance upon the common law rules of attribution, the requirement that the fault element of the offence is proved to attach to a person in a high ranking managerial position (a directing mind) often entails prosecution of that individual for the offence in question in addition to the corporate prosecution. Provision of the kind that is at section 14 has the effect of widening the scope of culpability to include those who fall short of full intent but nevertheless consented or connived in the offence.

### **Section 15 – Offences under section 7 by partnerships**

77. This section clarifies the position on proceedings against partnerships under section 7 offences; how those proceedings should be brought and how any fines imposed on the partnerships should be paid.

### **Section 16 – the Application to Crown**

78. As is the norm the Act does not apply to the Crown, and emanation of the Crown, such as Government departments. This section, however, applies the Act to individuals in the service of the Crown, making them liable to prosecution if their conduct in office amounts to an offence under the Act.

### **Section 17 – Consequential provision**

79. This section abolishes previous common law offences which the Act replaces, gives effect to relevant consequential amendments and sets out the Act’s delegated powers.

### **Section 18 – Extent**

80. This section provides that the Act extends to the whole of the UK.

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<sup>24</sup> See page 15

**Section 19 – Commencement and transitional provisions**

81. This section details the means by which the Act shall commence. It also provides that the repeal or abolishment of the old statutory or common law offences does not affect the prosecution of cases under that law committed in whole or in part before the relevant repeal or abolition.

## 4. Implementation of the Act and Guidance

82. The Bribery Bill received Royal Assent on 8 April 2010, in the last days of the Labour administration, becoming the Bribery Act 2010. The new coalition Government recognised that before the Act could be commenced there was a need to address the concerns in the business community about the new failure to prevent corporate liability offence and to comply with the statutory requirement for the publication of guidance on commercial bribery prevention and to raise awareness of the Act.

### (vi) The development of the Ministry of Justice Guidance

83. In recognition of the innovative character of the section 7 failure to prevent offence and to assist individual businesses in determining what may be “adequate” procedures for preventing bribery on their behalf for the purposes of the statutory defence to a charge under section 7, section 9 of the Act requires the Secretary of State to publish guidance about procedures that commercial organisations can put into place to prevent persons associated with them from bribing. The task of developing and publishing the guidance fell to the Ministry of Justice.

84. Draft Guidance was published for public consultation in September 2010. The consultation closed on 8<sup>th</sup> November of that same year. The Government received 179 responses, 80% of which were from the business community. Anti-corruption civil society organisations, such as Transparency International and those with the Bond Group of organisations, also submitted substantial responses. During the consultation period and beyond the Ministry of Justice, in collaboration with the devolved administrations and external interested parties, such as law firms, compliance professionals and local Chambers of Commerce, arranged various Bribery Act events for discussion of the issues associated with the development of the guidance. There were three in London, and one each in Birmingham, Edinburgh, Cardiff and Belfast. In addition, the Ministry of Justice engaged with business representative bodies, civil society organisations, the compliance sector and law firms in meetings and at several events held by organisations such as the OECD, the British Bankers Association and the Charity Finance Directors Group during this period.

85. This high level of consultation, which was necessary if the guidance was to be meaningful, inevitably resulted in some delay in the publication and in turn the commencement of the Act. The Government agreed that the Act should not be commenced less than three months after the section 9 guidance was published to give the business community time to properly familiarise themselves with it before the Act had effect. The Government announced in January 2011, that the commencement of the Act would be delayed from April to July 2011. The Ministry of Justice Guidance was published on 30 March 2011, accompanied by a Parliamentary Written Ministerial Statement by the Lord Chancellor and Secretary of State for Justice the Rt Hon Kenneth Clarke CH QC MP. The Act was duly commenced on 1 July 2011.

### (vii) Ministry of Justice Guidance

86. Two sets of guidance were issued by the Ministry of Justice. The document “THE BRIBERY ACT 2010 Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing



(section 9 of the Bribery Act 2010)” (with a dark wine-coloured cover) fulfilled the statutory requirement of section 9 of the Act and was intended to help all commercial organisations understand more about the procedures they could put in place to prevent bribery. A second document, “THE BRIBERY ACT 2010 Quick Start Guide” (with a dark green cover) is non-statutory guidance intended to be of assistance to smaller commercial organisations in understanding how they could address bribery prevention.<sup>25</sup> This Quick Start Guide also suggested that the smaller companies consult relevant bodies for advice, including UK Trade and Investment, and the, then Government sponsored, Business Anti-Corruption Portal (BACP); a one-stop shop for business anti-corruption information offering tools on how to mitigate risks and costs of corruption when conducting business abroad.

87. The main guidance document (dark wine cover) promotes a risk based approach to bribery prevention. It is principle based and outcome focused. It is not prescriptive and is not a one-size-fits-all document. It is rather a guide as to how businesses should go about the task of determining what is required for them in the way of bribery prevention procedures. The guidance was designed to allow each individual business to arrive at an outcome in which they will be clear as to the right measures needed to mitigate the bribery risks that they face. This approach is the only practical way of offering guidance of general application given the enormous variation in circumstances in which businesses operate. A small organisation facing low to medium bribery risks is not going to require the kind of sophisticated prevention procedures that would allow a large multi-national company that operates in many high-risk regions around the world to achieve “adequacy” for the purposes of section 7.
88. The guidance first offers a description of the section 7 predicate offences (the active bribery offences at section 1 (general) and section 6 (bribery of a foreign public official) and addresses some of the policy issues that arise when the Act’s concepts are applied to business practices; such as hospitality, promotional and other business expenditure, through providing illustrative examples. Turning to section 7 this part provides guidance on what factors would be relevant to determining whether a foreign company could be regarded as carrying on a business in the UK for the purposes of section 7. It offers analysis of the meaning of an “associated” person, addressing issues such as the application of the Act to bribes paid in the context of joint ventures, the relationship between parent companies and subsidiaries and the significance of indirect benefits. Importantly, it explains that the adequacy of bribery prevention procedures would be decided on the facts of each individual case by the court before turning to how the Act would impact on the use of facilitation payments, which are not exempt under the Bribery Act, and the role of prosecutorial discretion.
89. The second part of the guidance describes how each of the six principles is intended to assist businesses in determining what is right for them in their particular set of circumstances. The Six principles are Proportionate procedures; Top-level commitment; Risk Assessment; Due diligence; Communication and training and Monitoring & review. The following is a summary of the guidance provided under each principle.

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<sup>25</sup> Both sets of guidance can be found at: <https://www.gov.uk/government/publications/bribery-act-2010-guidance>

*Principle 1 – Proportionate procedures*

90. The first principle of proportionality is key to the overall approach to bribery prevention the guidance describes. Prevention measures should be proportionate to the bribery risks a company faces and to the key characteristics of the company; such as its size, management structure and business model. They should also be clear, accessible and practically enforced. An initial risk assessment is therefore a necessary first step. Once identified the required bribery prevention measures can be implemented in either a standalone form, or as part of any wider measures, such as a code of conduct. An indicative list of items that prevention procedures might include is provided.

*Principle 2 – Top level commitment*

91. Senior management have an important role to play in establishing the “tone from the top” clearly signaling corporate commitment to bribery prevention. The aim is to foster a “zero tolerance” culture. Top-level involvement in the development of the required procedures and their implementation and communication of policies and procedures is an important aspect of a company’s strategy.

*Principle 3 – Risk Assessment*

92. It is obvious that without a realistic assessment of bribery risks it will be very difficult to decide how such risks should be mitigated. The assessment of internal and external bribery risks should be periodic in order to take account of changes in the company or its business. Risk assessment procedures should incorporate management oversight and should be properly resourced. The guidance gives examples of commonly encountered external risks in five broad groups – country risk, sectoral risk, transactional risk, business opportunity risk and business partnership risk.

*Principle 4 – Due diligence*

93. Due diligence is the natural companion of risk assessment. Businesses need to know who they are doing business with and who they are employing in key roles. Due diligence is both part of the process of assessing risk and the procedures taken to prevent bribery. Certain business relationships will require extra care; e.g. where local law dictates reliance on local agents. A risk based approach should be conducted in every case and additional monitoring or appraisal may be required.

*Principle 5 – Communication (including training)*

94. Internal and external communication and training help in embedding bribery prevention procedures throughout a company. Measures such as a formal statement of the company’s intent should be communicated widely on a regular basis, highlighting the key elements of the company’s strategy. Good communication on matters such as financial control, hospitality and facilitation payments enhances general awareness and understanding amongst staff and third-party associates. Training, which could be mandatory, helps to maintain an anti-bribery culture and can be of value to third party associates as well as employees.

*Principle 6 – Monitoring and review*

95. Businesses should regularly monitor and review bribery prevention procedures and make improvements where necessary. This may be in response to clear change in

circumstances, such as for example governmental changes in the countries in which they operate. Staff surveys, questionnaires, training feedback forms and drawing on practice in other organisations can be helpful in this regard. It may also be appropriate to consider seeking some form of independent verification or assurance of anti-bribery procedures, or comparing them with those maintained by the standards offered by industrial sector associations or multilateral bodies.

#### *Illustrative case studies*

96. The document also includes a series of Bribery Act case studies at Appendix A. As is explained in the text these eleven case studies do not form part of the statutory guidance. They do not supersede or replace any of the principles set out in the guidance and do not purport to set any standards. They are not intended to be comprehensive or conclusive of adequacy or inadequacy for the purposes of section 7 of the Act. They provide an illustration of possible outcomes resulting from the application the six principles of the guidance in various hypothetical business bribery scenarios.

#### **(viii) Bribery Act awareness raising**

97. Awareness raising of the Bribery Act and the Ministry of Justice guidance, which commenced with the period of consultation on the guidance as described above, continued in earnest once the guidance was published in April 2011. From April to November that year the Ministry of Justice participated in no less than twenty-four awareness raising events in the UK held by business representative bodies, legal firms, legal representative bodies and a legal research organisation, civil society organisations, compliance and professional services organisations, professional event organisers, regulators and individual companies. In the same year, as an outreach exercise given the global reach of the Act and to promote understanding of section 7 offence and the Ministry of Justice guidance in overseas markets where UK companies will be in business relationships with local entities, the Ministry of Justice in collaboration with the FCO participated in events such as conferences, seminars and roundtable discussions in the USA, Latvia, Dubai, Germany and Hungary.

98. In subsequent years the Ministry of Justice continued to participate in UK based awareness raising events similar in nature to those of 2011, and in overseas awareness raising, again in partnership with the FCO. In 2012 there were awareness raising visits to Brazil, Sweden, China and South Africa. In 2013 there was a series of events in Malaysia and Indonesia. In 2014, 2015 and 2016 there were visits to India, USA, South Korea, Moldova, Peru, and two to Mexico City. During this period there was also inward visits of officials from Colombia, Brazil, Egypt (British Chamber) and South Korea.

99. Enhancing awareness of the overseas has also enhanced the influence of the Bribery Act and the Ministry of Justice guidance in the development of reforms in other jurisdictions. This has occurred most obviously in our Overseas Territories<sup>26</sup> but has also occurred in foreign jurisdictions. The Argentinian interaction with the Act provides a good example. At the end of last year, the Argentinian anti-corruption authorities took part in a three-day visit to the UK, meeting all the relevant UK Government

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<sup>26</sup> The Act has heavily influenced new legislation in Bermuda, the Isle of Man and Gibraltar, for example.

departments and agencies to gain a better understanding of the anti-corruption system in the UK. They took away from that visit a lot of information on the Bribery Act, other legislation, guidance and good practice. They are now using the UK guidance as a model for their own guidelines on corporate liability legislation. In addition, the British Embassy in Buenos Aires also last year organised with the Argentine Financial Investigation Unit a workshop on anti-bribery legislation and best practices based on the Bribery Act. Another example is Malaysian legislation passed in April this year introducing corporate liability, modelled on section 7 of the Bribery Act, by amendment to the Malaysian anti-corruption statute.<sup>27</sup>

100. In Scotland the Crown Office and Procurator Fiscal Service personnel regularly speak at industry 'Continuing Professional Development' and other training private sector events in order to raise awareness about the Act and the self-report initiative within Scotland.<sup>28</sup>

101. The publication of the Ministry of Justice guidance and the commencement of the Act triggered an immediate response from compliance professionals. The opportunities created by the Act and guidance by the need for businesses across all sectors of the economy to assess bribery risks and determine the nature of proportionate bribery prevention measures they required were fully exploited by the professional compliance sector. The activity this engendered in terms of advice to individual companies, private sector Bribery Act events and sector based initiatives, including further sector specific guidance,<sup>29</sup> significantly enhanced the levels of awareness of the Bribery Act across the whole economy.

102. From the beginning of the awareness raising activity it was recognised that large companies, especially those with a multinational presence, were already familiar with various compliance standards, including those of the US Foreign Corrupt Practices Act relating to bribery. It was therefore anticipated that the challenge would be to influence the approach to bribery prevention in small and medium sized enterprises, who typically do not devote resources to monitoring compliance.

103. In March 2013 a House of Lords Select Committee Report on Small and Medium Sized Enterprises ("SMEs") recommended that the Government "... *raise awareness amongst SMEs about the application of the Bribery Act 2010 and explain exactly how it will be applied in practice.*" In July 2013 as part of the Red Tape Challenge the Government announced that the then Department of Business, Innovation and Skills and the Ministry of Justice would work with SMEs to ensure they understand the requirements of the Act and only put in place proportionate measures to comply. Pursuant to this announcement the Ministry of Justice and the Department for Business, Innovation and Skills commissioned a survey of 500 SMEs, who were either exporting goods or were planning to do so.

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<sup>27</sup> See new section 17A of the Malaysian Anti-Corruption Commission Act 2009  
[http://www.sprm.gov.my/images/Akta-akta/SPRM\\_act\\_BI.pdf](http://www.sprm.gov.my/images/Akta-akta/SPRM_act_BI.pdf)

<sup>28</sup> See Enforcement page 31

<sup>29</sup> For example, the Anti-Corruption Forum (a business anti-corruption organisation) publication "GUIDANCE ON THE BRIBERY ACT 2010 FOR THE INFRASTRUCTURE SECTOR"  
[http://www.giacentre.org/documents/FORUM.GUIDANCE\\_Abridged.pdf](http://www.giacentre.org/documents/FORUM.GUIDANCE_Abridged.pdf)

104. In summary, the results of the research<sup>30</sup> showed that there were good levels of awareness of the Act among SMEs<sup>31</sup> and that awareness was greater among SMEs exporting to regions that are less developed. Around eight in ten SMEs that had heard of the Bribery Act were also aware that the Act has extra-territorial reach. Also, almost three-quarters of SMEs aware of the Act considered that their company had sufficient knowledge and understanding to be able to put adequate anti-bribery procedures in place. On the other hand, nearly three-quarters of SMEs that were aware of the Bribery Act were not aware of the MoJ guidance. All but one in ten, however, of those SMEs that had consulted the guidance reported that they found the guidance to be useful. A significant proportion of SMEs that were aware of the Act reported that they used other forms of guidance<sup>32</sup> and also that they had requested advice from the legal profession. The mean cost to SMEs of professional advice was around £3,740.<sup>33</sup> Around four in ten SMEs said that they had put bribery prevention procedures in place; defined as anything that they thought helped prevent bribery. Of those that had bribery prevention procedures in place the mean spend to date was around £2,730.<sup>34</sup> Only a few SMEs reported that employees of their company or agents acting on the company's behalf had ever been asked for facilitation payments. Most SMEs aware of the Bribery Act considered that Act had had no impact at all on their ability or plans to export and nine in ten reported that they had no specific concerns or problems.

#### **(ix) Business response to the Act, guidance and awareness raising**

105. The Government has not commissioned research other than the SME research referred to above, but the feedback during the extensive awareness raising activity following the publication of the Ministry of Justice guidance and the commencement of the Act, suggests that the message that bribery prevention should be a standard component of corporate good governance did get across to a wide range of businesses in many sectors. In the years since further anecdotal evidence emerging from the compliance sector, through liaison between Government, civil society and the business community and private sector research,<sup>35</sup> suggests that section 7 of the Bribery Act has been broadly successful in incentivising businesses large and small, and indeed businesses with headquarters overseas, to assess the bribery risks they face and to put in place procedures to mitigate them.

106. Nevertheless, the Government is aware that a shortfall in awareness of the Act and Ministry of Justice guidance remains, particularly among SMEs.<sup>36</sup> The Government is

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<sup>30</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf)

<sup>31</sup> Two-thirds of the SMEs surveyed had either heard of the Bribery Act 2010 or were aware of its corporate liability for failure to prevent bribery

<sup>32</sup> From business consultants, and trade or professional bodies

<sup>33</sup> The median cost was lower at £1,000.

<sup>34</sup> The median spend was £1,000.

<sup>35</sup> For example: FTI Consulting "The Realities of the UK Bribery Act 2012" <http://www.fticonsulting.com/~media/Files/us-files/insights/featured-perspectives/the-realities-of-the-uk-bribery-act.pdf>

<sup>36</sup> A 2016 report of the All Party Parliamentary Group on corruption suggested that UK exporters to high bribery risk markets would benefit from improved government guidance and that guidance for SMEs could be better matched to their specific needs as exporters. Reaching Export 2020 with integrity: How can UK businesses be better supported to manage corruption risks in high growth markets? (<https://www.dropbox.com/s/2hk40jaenhontu0/%20APPG%20Anti->

therefore continuing to look at the needs of businesses, especially SMEs, for a post-Brexit exporting Britain and is working with business to strengthen the Government input to the assistance they need to maintain strong integrity when doing business overseas.<sup>37</sup>

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Corruption%20Reaching%20Export%202020%20with%20Integrity%20Report%2009122016%20.pdf?dl=0)

<sup>37</sup> Principally through the cross-Government development of the Business Integrity initiative

## 5. Enforcement of the Act

107. The Bribery Act is enforced in England and Wales by the Serious Fraud Office and the Crown Prosecution Service and in Scotland and Northern Ireland by the Crown Office and Procurator Fiscal Service (“COPFS”) and the Public Prosecution Service for Northern Ireland respectively.<sup>38</sup> Tables 1 and 2 give the most up to date criminal justice statistics for proceedings and convictions in England and Wales for the offences at sections 1 and 2 of the Bribery Act.<sup>39 40 41</sup> Table 3 above gives the data for proceedings under the Bribery Act in Scotland for three years beginning in 2013/14.<sup>4243</sup> There have been no prosecutions under the section 6 (bribery of a foreign public official) offence.

**Table 1**

Defendants proceeded against at magistrates’ courts and found guilty and sentenced at all courts, for offences under Section 1 Bribery Act 2010, England and Wales, 2011 to 2016

<b>Outcome</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Proceeded against	1	1	4	2	2	5	7
Found guilty	-	1	2	2	2	4	3
Sentenced	-	1	2	2	2	4	3
<i>of which</i>							
Absolute discharge	-	-	-	-	-	-	-
Conditional Discharge	-	-	-	-	-	-	-
Fine	-	-	-	-	-	-	-
Community sentence	-	-	-	-	-	1	-
Suspended sentence	-	1	-	-	-	-	2
Immediate custody	-	-	2	2	2	3	1

<sup>38</sup> The SFO also has jurisdiction to enforce the Bribery Act in Northern Ireland for cases falling within their ‘serious or complex’ remit.

<sup>39</sup> The figures given in the tables relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

<sup>40</sup> Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

<sup>41</sup> The number of defendants found guilty in a particular year may exceed the number proceeded against as the proceedings in the magistrates’ court took place in an earlier year and the defendants were found guilty at the Crown Court in the following year; or the defendants were found guilty of a different offence to that for which they were originally proceeded against.

<sup>42</sup> There were no proceedings under the Bribery Act 2010 prior to 2013-14 in Scotland

<sup>43</sup> There have been no prosecutions in Northern Ireland under the Bribery Act 2010

Outcome	2011	2012	2013	2014	2015	2016	2017
ODW	-	-	-	-	-	-	-
Compensation	-	-	-	-	-	-	-

**Table 2**

Defendants proceeded against at magistrates' courts and found guilty and sentenced at all courts, for offences under Section 2 Bribery Act 2010, England and Wales, 2011 to 2016

Outcome	2011	2012	2013	2014	2015	2016	2017
Proceeded against	-	-	2	1	-	1	9
Found guilty	-	1	1	5	1	-	6
Sentenced	-	1	1	5	1	-	5
<i>of which</i>							
Absolute discharge	-	-	-	-	-	-	-
Conditional Discharge	-	-	-	-	-	-	-
Fine	-	-	-	-	-	-	-
Community sentence	-	-	-	1	-	-	-
Suspended sentence	-	-	-	-	1	-	4
Immediate custody	-	1	1	4	-	-	1
ODW	-	-	-	-	-	-	-
Compensation	-	-	-	-	-	-	-

**Table 3**

Number of people proceeded under Bribery Act 2010 S1, S2, S6<sup>1</sup>, 2013-14 to 2016-17 in Scotland

		2013-14	2014-15	2015-16	2016-17
BRIBERY ACT 2010 SECTION 1(2)	Not Guilty	1	-	1	1
	Guilty	1	1	-	-
Total		2	1	1	1

**(x) Prosecution guidance**

108. The Director of Public Prosecutions and the Director of the SFO have issued joint prosecution guidance which sets out their approach when considering prosecution for offences under the Bribery Act 2010.<sup>44</sup> All such decisions must be made in accordance with the Code for Crown prosecutors and the guidance outlines further factors relevant to prosecutorial decision-making concerning bribery. There is also joint guidance relating to corporate prosecutions.

**(xi) Cases under section 7 of the Bribery Act (corporate failure to prevent)**

109. There have been two cases prosecuted under section 7 of the Act, detailed below. The inclusion of the three DPAs predicated at least in part on section 7 brings the total

<sup>44</sup> See paragraph 21 above and footnote 3



to five section 7 cases in nearly seven years. This total reflects the typically long investigations in corporate bribery cases; often taking several years, involving liaison with the authorities of foreign jurisdictions and the obtaining, review and analysis of large amounts evidence, bringing with it onerous disclosure obligations for the prosecuting authorities. The SFO is still investigating cases based on facts that, at least in part, pre-date the commencement of the Bribery Act. It also reflects the protracted criminal proceedings in these cases due to the need for consideration of complex legal issues such as the impact of legal privilege.

#### Sweett Group (SFO)

110. Sweett Group PLC pleaded guilty on 18 December 2015 to an offence under section 7 Bribery Act 2010. The facts were that that between December 2012 and December 2015, the company failed to prevent corrupt payments through its subsidiary Cyril Sweett International Limited to a male named Khaled Al Badie. The purpose of the bribery was to secure a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai. On 19 February 2016, Sweett Group PLC were sentenced and ordered to pay £2.25 million (£1.4m in fine and c£850,000 in confiscation). Additionally, £95,000 in costs were awarded to the SFO.

#### Skansen interiors Limited (CPS)

111. On 21 February 2018, Skansen Interiors Limited was convicted by a jury at Southwark Crown Court, of failing to prevent bribery contrary to section 7 of the Bribery Act 2010. In 2012, the Corporate which had a turnover of £17.5m did not have adequate procedures in place to prevent bribery. The Managing Director had bribed a representative of a major construction company for interior 'fit-out' contracts worth £6m.
112. Following charge in 2014 the Corporate no longer traded, with its trading activity and balance sheet transferred to the parent company, Skansen Group Limited (SGL). Skansen Interiors Ltd was kept in existence to maintain warranties relating to previous contracts. The parent company was therefore able to retain the commercial benefit of being able to honour indirectly the warranties, without any liability arising out of the criminal conduct.
113. A DPA was considered in line with the published guidance but deemed not appropriate. Although the penalty anticipated was a fine, by the time of sentence the Corporate had no independent means to pay any fine, and was therefore sentenced by way of absolute discharge. The judge made it clear however that a financial penalty would have been imposed had the defendant had the independent means to pay. Both individuals in the case were separately charged and pleaded guilty at court, receiving sentences of 12 and 20 months respectively. The judge commented that it was appropriate to prosecute the Corporate.

#### **(xii) Deferred Prosecution Agreements**

114. DPAs were introduced in the Crime and Courts Act 2013<sup>45</sup> and became available in 2014. A DPA is a court-approved agreement between an organisation and a

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<sup>45</sup> S. 45 and Schedule 17

prosecuting agency that has evidence on which to prosecute the organisation for an offence. The organisation will be charged with the offence, but upon court declaration that the DPA is in the interest of justice and its terms are fair, reasonable and proportionate, the indictment will be suspended for the duration of the agreement, which will be in region of two to five years.<sup>46</sup> Upon the expiry of the DPA the proceedings are discontinued. The proceedings can only be reinstated by the prosecutor if the DPA is terminated by the court before expiry because of a breach of the terms of the agreement.

115. There are no mandatory terms of a DPA but they are likely to include a financial penalty, disgorging any profits made from the offence, cooperating with investigations into the conduct of individuals and the implementation and external monitoring of a compliance programme.

116. The ability to influence the future conduct of an organisation, rather than just penalise past failures, makes a DPA an appropriate tool for addressing corporate economic crime, where the organisation fully and transparently cooperates with the authorities. A Code of Practice for Prosecutors on the use of DPAs was published jointly by the SFO and CPS on 14 February 2014 after a public consultation.<sup>47</sup>

117. There have been four DPAs approved by the court, all heard by Sir Brian Leveson, the President of the Queen's Bench Division.<sup>48</sup> Three of the concluded DPAs are corporate bribery cases and are all predicated at least in part on an offence under section 7 of the Bribery Act.

### 1. Standard Bank Plc (30/11/15)

118. The UK bank was the subject of an indictment containing one charge of failing to prevent bribery contrary to section 7(1) of the Bribery Act 2010. This indictment was immediately suspended on approval of a DPA.

119. In the course of securing \$600m project financing by the government of Tanzania from the respondent bank and its sister company, an additional 1% fee was paid to a 'local partner', a Tanzanian company of which two of three directors and shareholders were current and former Tanzanian government officials. There was no evidence that the 'local partner' had provided any services related to the transaction. The withdrawal in cash of the vast majority of the \$6m fee from an account at the sister company led to a self-report to the SFO within three weeks and full cooperation.

120. Leveson P approved the terms of the DPA, which included: (a) payment of \$6m compensation to the Tanzanian state plus interest; (b) disgorgement of profit on the transaction of \$8.4m; (c) payment of a financial penalty of \$16.8m; (d) past and future cooperation with relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment; (e) at the respondent's expense,

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<sup>46</sup> The Rolls Royce DPA will be five years maximum duration with the possibility of ending after four years upon confirmation that it is concluded by the SFO. The XYZ DPA will be 2½ to 5 years depending on payment of the financial penalty in full. The Standard Bank DPA is 3 years in duration.

<sup>47</sup> [https://www.cps.gov.uk/sites/default/files/documents/publications/dpa\\_cop.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf)

<sup>48</sup> Two DPAs (XYZ and Tesco Stores Limited) are subject to reporting restrictions until the conclusion of related proceedings

commissioning and submitting to an independent review of its internal anti-bribery and corruption controls, policies and procedures regarding compliance with the act and other anti-corruption laws; and (f) payment of the SFO's costs.

## 2. XYZ Ltd (11/7/16)

121. Implementation of a compliance programme by the US parent company of a UK SME resulted in a self-report to the SFO in January 2013. In the course of subsequent DPA proceedings, the company was made the subject of a suspended indictment alleging conspiracy to corrupt, conspiracy to bribe and failure to prevent bribery contrary to section 7 of the Bribery Act 2010. The charges related to systematic payments to intermediaries for the procurement of export contracts to Asia from 2004 to 2013. The company is anonymised because of related criminal proceedings.

122. The DPA included financial orders against the company of c£6.5m comprised of a c£6m disgorgement of gross profits and a £352,000 financial penalty. c£19m of the disgorgement will be paid by the SME's US registered parent company as repayment of a significant proportion of the dividends that it received from the SME over the indictment period. Leveson P reiterated the principles to be applied in considering whether a DPA is in the interests of justice stating that 'it is important to send a clear message, reflecting a policy change... that a company's shareholders, customers and employees... are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile'.

## 3. Rolls-Royce Plc (17/1/17)

123. The SFO's investigation of Rolls Royce lasted four years and gave rise to a suspended indictment comprising twelve counts of conspiracy to corrupt, false accounting and failure to prevent bribery. These charges spanned from 1989 to 2013 and related to the sale of aero engines, energy systems and related services, the relevant conduct having taken place in Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia. In approving the DPA, Leveson P noted that despite this not being a self-referral a DPA was appropriate because of Rolls-Royce's 'extraordinary cooperation', and change of senior management and culture. The DPA involved payments of c£497m (comprising disgorgement of profits of c£258m and a financial penalty of c£239m) plus interest. Rolls-Royce are also reimbursing the SFO's costs in full (c£13m). The investigation into the conduct of individuals continues.

### **(xiii) The 'self-report' regime in Scotland**

124. A 'self-report' regime has been in place in Scotland since 2011, whereby companies are encouraged to make a report to COPFS if they uncover bribery or corruption within their own organisation, in the hope that they may avoid prosecution and be referred to the Civil Recovery Unit for civil settlement instead. There are stringent conditions which companies must comply with if they are to be considered for the initiative, and there is no guarantee that a self-report will allow a company to avoid prosecution; Crown Counsel consider various factors in deciding whether civil settlement is appropriate. In the event that a settlement is agreed with the company, directors and employees may still be prosecuted. The self-report scheme must be reviewed and approved each year by the Lord Advocate and it has now been extended several times which is viewed as a measure of its effectiveness. A number of cases of corruption, which might not otherwise have come to light, have been robustly

addressed through the scheme. Lengthy prosecutions have been avoided and significant sums, representing profit gained through corruption, have been recovered and re-invested into Scottish communities.

#### Section 7 settlement cases in Scotland

125. Thomas Gunn Navigation Services (TGNS) Ltd, a marine technology company based in Scotland and operating globally in the shipping sector, admitted that staff had made a series of payments to executives at a London-based shipping firm, in return for the award of contracts. The relevant conduct occurred between 2003 and 2012 and therefore involved breaches of the old legislation and section 7 of the Bribery Act. In 2013 a settlement was reached with the company in the sum of £138,000, and the former owner of the company was prosecuted separately. In 2015, he pled guilty to two charges on indictment: conspiracy to make corrupt payments contrary to the Prevention of Corruption Act 1906 and conspiracy to make corrupt payments contrary to the Bribery Act 2010. He was sentenced to a 200 hour community payback order. This was the first conviction in Scotland under the Bribery Act.
126. Braid Group Ltd, a Glasgow freight and logistics company self-reported that its subsidiary had obtained business through unlawful conduct in relation to two contracts, the first was an agreement whereby unauthorised expenses were incurred by the employee of a customer company and were funded by the fraudulent inflation of invoices provided to the customer, and the second was an agreement whereby the profit gained on services provided to a customer company was shared, in return for orders continuing to be placed. Braid Group accepted responsibility for a contravention of section 7 of the Bribery Act and in 2013 reached settlement in the sum of £2.2m, based on the gross profits made in respect of the relevant contracts. A criminal investigation is ongoing in relation to individuals.
127. Brand Rex Ltd is a company which provides cabling solutions to industry and employs over 300 staff in Scotland. It operated a legitimate incentives scheme involving rewards, including holidays, which were given to distributors for meeting sales targets. During a Brand Rex review, however, it came to light that the scheme had been abused, as a distributor had passed the rewards on to the employee of a client company, who was in a position to influence the award of contracts. Brand Rex launched an investigation and made a self-report to COPFS, accepting that they had failed to prevent this, contrary to section 7 of the Bribery Act 2010. In 2015, settlement was reached in the sum of £212,800, based on the gross profit of the company which was attributable to the misuse of the incentives scheme.

## 6. Legal Issues

128. No legal issues relating to the interpretation of the Bribery Act have emerged during the criminal proceedings to date; including the three DPAs premised on section 7 of the Act.
129. In April 2014, however, in an appeal<sup>49</sup> concerning the interpretation of the concept of “carrying on business in the UK” under section 86(1) Enterprise Act 2002 (“EA”), the Court of Appeal (“CA”) civil division gave guidance on the phrase which may have relevance to cases brought under section 7 of the Bribery Act. Under section 7, the failure to prevent offence applies to a foreign company or partnership that “carries on a business, or part of a business in any part of the United Kingdom”.
130. The CA were dealing with an appeal from a decision of the Competition Appeal Tribunal (“CAT”) prohibiting completion of a proposed transaction between Akzo Nobel NV, a Dutch registered company (“Akzo”) and Metlac Holding SRL (an Italian company). The facts of the case do not need to be rehearsed here. The salient point is that the CAT can only effect such a prohibition in respect of conduct that takes place outside the UK only if the person is a UK national or body incorporated in the UK, or “a person carrying on business in the UK”. In coming to their decision that Akzo carried on business in the UK the CAT noted that its management structure showed that its participation in the activities of its subsidiaries, including those in the UK, was extensive and included the approval of operational decisions. On that basis it held that Akzo was carrying on business in the UK even though it was based in the Netherlands. The CA upheld the CAT decision commenting that it is not necessary for a company to have a physical presence or fixed place of business in the UK to be found to be carrying on a business here. The CA confirmed that if a parent of a subsidiary carrying on business in the UK left the entire management of the business to the subsidiary’s directors, “the parent would not solely on that account be carrying on the business at all”.
131. Although the difference between “carrying on business” (as in the EA) and “carrying on a business” (as under the Bribery Act) should be noted, this decision may in the future inform the courts approach to the phrase “carrying on a business” at section 7 of the Bribery Act. The phrase has not yet been considered by the courts in the context of section 7 criminal proceedings. As set out in the Ministry of Justice guidance on section 7, the Government position reflects the Court of Appeal view in the Azko case by stating that having a UK subsidiary does not necessarily means that a parent company is carrying on a business in the UK. The courts will be the final arbiter as to whether the test is fulfilled in individual cases, but as set out in the guidance the Government believes that a common-sense approach to interpretation of the phrase is required so that the phrase will catch foreign companies that have a demonstrable business presence in the United Kingdom.

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<sup>49</sup> AKZO NOBEL N.V. and COMPETITION COMMISSION & ORS, METLAC HOLDING S.R.L. intervening Akzo Nobel NV v Competition Commission & ors [2014] EWCA Civ 482.

## 7. Preliminary Assessment

132. Bribery is not reported as a volume crime in the United Kingdom. The Bribery Act 2010 was, therefore, not borne of a need to address an urgent domestic problem but rather the culmination of a law reform exercise that reflected the acknowledgment that the existing law was anachronistic, irregular in its coverage and often difficult to apply and was therefore not fit for the purpose of supporting the UK's intention of playing a leading role in the international consensus against bribery, particularly commercial bribery, that emerged in the late 1990s. The development of the legislative proposals and their formulation was informed by the twin policy objectives of consolidating and modernising the law to afford the prosecution authorities and the courts the tools they required to address bribery, at home and abroad, in the twenty-first century effectively and to provide a quasi-regulatory incentive for the adoption of bribery prevention as an integral part of corporate good governance.

133. The experience to date suggests that these policy objectives have been met. The Act is being used to prosecute cases and, although cases are not numerous, proceedings so far do not suggest that there are any problems associated with interpretation of the Act's provisions. There have been successful prosecutions under sections 1, 2 and 7 of the Act and the new ability to use DPAs has been relied on three times in cases that are at least in part premised on the commission of an offence of a corporate failure to prevent under section 7. The reason for the lack of prosecutions under section 6 of the Act is not clear but it may be in part because any individuals perpetrating bribery overseas on behalf of businesses seeking publicly funded business opportunities will typically not be UK nationals or non-nationals ordinarily resident in the UK. The Bribery Act is recognised internationally as the leading model, alongside the US Foreign Corrupt Practices Act, for effective criminal anti-bribery legislation. Moreover, the UK is recognised as one of the top four enforcers of the OECD Convention against bribery.<sup>50</sup> The UK was reviewed against the OECD bribery convention in 2017.<sup>51</sup> The review offered a very positive assessment of the UK legislative framework.

134. The extensive awareness raising campaign following the publication of the Ministry of Justice guidance and the commencement of the Act, coupled with private sector compliance industry initiatives, has been broadly successful in incentivising businesses to assess the bribery risks they face and to implement bribery prevention procedures to mitigate them; although there may be further work required in respect of SMEs.

135. The Government's preliminary assessment is that the Bribery Act has fulfilled the functions that Parliament intended it to perform in the seven years since it became law.

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<sup>50</sup> [https://www.transparency.org/whatwedo/publication/exporting\\_corruption\\_progress\\_report\\_2015\\_assessing\\_enforcement\\_of\\_the\\_oecd](https://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd)

<sup>51</sup> The full report can be found at: <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>



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