



Ministry
of Justice

Government response to the House of Lords Select Committee on the Bribery Act 2010

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Government response to the House of Lords Select Committee on the Bribery Act 2010

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

May 2019



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Contents

Introduction	3
Background	4
Response to the Committee's conclusions and recommendations	5
The offences of bribery and being bribed (sections 1 and 2)	5
Corporate hospitality	12
Bribery of foreign public officials, and facilitation payments (section 6)	12
Brexit issues	14
Failure to prevent bribery (section 7)	15
Deferred prosecution agreements	17
Small and medium enterprises	20
The position in Scotland	22

Introduction

1. The House of Lords Liaison Committee first considered setting up a Committee to conduct a post-legislative review of the Bribery Act 2010 in February 2017, but considered it was too soon to proceed and postponed scrutiny for a year. In March 2018 the Liaison Committee recommended that it was now time to proceed, which the House accepted and so the Bribery Act Committee was set up on 17 May 2018.
2. It was recommended that the Committee should focus on whether the Act has led to a stricter prosecution of corrupt conduct, a higher conviction rate and a reduction in such conduct; whether UK businesses have been put at a competitive disadvantage in obtaining foreign contracts under the stricter provisions of the Bribery Act; and whether small and medium enterprises (SMEs) were sufficiently aware of the provisions of the Act. In addition, the Committee was asked to investigate how Deferred Prosecution Agreements (DPAs) have affected the conduct of companies, both in preventing corrupt conduct and investigating it once it has been discovered.
3. The Committee published its final report 'The Bribery Act 2010: post-legislative scrutiny' on 14 March 2019. The report made thirty-five conclusions and recommendations around implementation and enforcement, which focussed on the operation of the particular provisions of the Act, including the section 7 'failure to prevent' offence; DPAs; the accompanying guidance; SMEs and the position in Scotland. The government is grateful to the Committee for their detailed report and its many conclusions and recommendations. The government has considered these carefully and addresses each in this response.

Background

4. Bribery is a serious crime that destroys the integrity, accountability and honesty that underpins ethical standards in both public life and in the business community. In the face of growing criticism by both domestic and international stakeholders, it was apparent that reform of the previous law on bribery was increasingly necessary to deal effectively with ever more sophisticated, cross-border use of bribery in the modern world. The main objective in the development of the Act itself, was therefore to provide modern legislation which reformed the existing common law and statutory offences of bribery by introducing a new consolidated scheme of bribery offences and gave the police, prosecutors and the courts an effective way of tackling bribery whether committed at home or abroad. At the same time, the Government also sought to provide the private sector and affected companies with greater certainty and consistency around bribery and their obligations, thereby bringing justice to those involved in, or affected by bribery and a reinforcing of proper ethical conduct in commercial conduct and society in general.
5. A further main policy objective was to address issues raised in relation to our international Anti-Corruption obligations and to put in place an effective mechanism for prosecuting bribery involving foreign public officials and establish effective corporate liability for bribery. Perhaps most importantly, it was envisaged that the Act would support the Government's wider strategy for tackling international corruption not only by deterring and penalising bribery, but also by encouraging and supporting business to apply appropriate standards of ethical business conduct. In this regard, the Government had a specific objective of combating the use of bribery in high value transactions in international markets – and in particular, in large scale public procurement or similar tendering exercises where predominantly only the largest businesses operate. Whilst the legislation would ultimately apply to all companies falling within scope of the definition of the offence, SMEs would not usually engage in the business environment described above. Therefore, it was not envisaged that they would fall within the main focus of enforcement activity.
6. As the Committee itself observed, however anticipated or well received a Bill may be, it is by no means guaranteed that a resulting Act will live up to expectations. The Bribery Act has already received high praise for being a successful Anti-Corruption tool internationally but, whilst the Government is mindful that the evidence submitted to the Committee supported its initial assessment that the Act was performing as Parliament had intended, it is especially grateful that no major criticisms were made. Whilst there is always a case for listening to suggestions where there might be improvement, the Government is grateful for the Committee's assessment that the overall structure of the Act, the offences it created, its deterrent effect, and interaction with DPAs are some of the main aspects which have received almost universal praise.

Response to the Committee's conclusions and recommendations

- 1. The first draft Corruption Bill was subject to scathing criticism, and the Government did not proceed with it. The draft Bribery Bill, by contrast, has resulted in an Act which has been much praised. Our recommendations deal mainly with the implementation and enforcement of the Act. (Paragraph 38 of the report)**
7. The Government is grateful to the Committee for conducting post-legislative scrutiny of the Bribery Act. The Act was the result of an extensive body of work by government, Parliament and the Law Commission which has successfully strengthened the UK's position as a world-leader in helping to deter and prevent bribery and corruption.

The offences of bribery and being bribed (sections 1 and 2)

- 2. We commend the Home Office's decision to look at options for a centralised reporting mechanism for bribery. (Paragraph 54)**
8. The Committee's comment is noted.
- 3. The appropriate use of misconduct in public office charges is a separate issue being considered by the Law Commission, and we make no recommendation on this. However, we believe that conduct which constitutes an offence under the Bribery Act should not be prosecuted as the common law offence of misconduct in public office. (Paragraph 60)**
9. It is the role of the prosecutors to ensure the right person is charged for the right offence and their decisions are made independently. In doing so they will look across all legislation to charge offences which are reflective of the evidence at hand.
10. The Crown Prosecution Service (CPS) and Serious Fraud Office (SFO) will always apply the Code for Crown Prosecutors to determine whether there is enough evidence to charge and if it is in the public interest to bring a case to court. In *Rimmington* [2005] UKHL 63, the House of Lords held that "good practice and respect for the primacy of statute do... require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise". Section 6 of the Code for Crown Prosecutors sets out the principles prosecutors apply when selecting the appropriate charge or charges.

11. It should be noted that the CPS has no power to prompt an investigation or direct the police (or other investigative agencies) and can only provide advice on cases referred to them. Where the SFO investigates and prosecutes serious and complex fraud, including bribery and corruption, and conduct which constitutes an offence under the Bribery Act, it would normally be charged under the Act rather than the common law offence of misconduct in public office. However, looking beyond the Bribery Act and applying alternative legislation has resulted in many successful prosecutions and aided prosecutors in the fight against corruption.

4. We invite the Intelligence and Security Committee to take evidence on the extent to which the section 13 defence is being used, and whether its use can in each case be justified; and, if they think fit, to make recommendations for the amendment or repeal of the provision. (Paragraph 67)

12. In relation to Section 13, the Government would reiterate that as the defence is constrained to circumstances where the conduct was necessary for the proper exercise of any function of an intelligence service or the armed forces when engaged on active service, this defence is not available to protect corrupt defence company personnel.

13. The Intelligence and Security Committee (ISC) have accepted this invitation to take evidence on Section 13 and have already contacted Home Office officials with the questions raised in the report.

14. Work is underway to answer the ISC's questions and the Home Office will respond in due course.

5. We recommend that the Director of the Serious Fraud Office and the Director of Public Prosecutions publish plans outlining how they will speed up bribery investigations and improve the level of communication with those placed under investigation for bribery. (Paragraph 78)

15. The prosecution agencies are aware of the need to progress cases without delay and are committed to doing so where possible. Cases of this nature are often complex. Investigations (and subsequent prosecutions) are resource-intensive and lengthy, often taking several years to complete. The majority also have a significant international dimension and involve examining large amounts of material and digital data. Both the CPS and SFO set out in their Business Plans commitments to deliver timely justice. Actions have already been taken (and will continue to be taken) to address this.

16. The CPS have an established and dedicated Specialist Fraud Division that prosecutes the most serious and complex fraud and economic crime cases investigated in England and Wales by police, HMRC and other government

departments. Prosecutors work closely with investigators and are available to be involved in cases at the earliest opportunity to provide early investigative advice to mitigate any potential risks. These could include the bribery and corruption being perpetrated over a longer period of time involving more victims or greater losses; or evidence being destroyed or removed leading to the investigation and trials taking longer than they need to.

17. A number of measures have been introduced within the Specialist Fraud Division of the CPS to ensure cases progress effectively, as follows:

- All bribery cases now have two allocated CPS Prosecutors, including a Senior Specialist Prosecutor.
- All pre-charge cases, including bribery, are subject to monthly review between the Prosecutor and their manager.
- All pre-charge cases over two years old, including bribery, are considered for a Local Case Management Panel meeting which is chaired by a Deputy Head of Division to scrutinise legal decision making and case progression.
- All bribery cases are considered for inclusion on the Division's Sensitive Case List.
- Legal managers are provided with weekly data on pre-charge cases, including bribery cases, to ensure that cases are regularly reviewed and progressed.

18. In respect of the SFO, since taking up office in August 2018, their current Director has emphasised that speeding up the pace of their investigations is a key priority for the organisation. Accordingly, the SFO's Business Plan for 2019/20 outlines how SFO will speed up fraud and bribery investigations. The plan focuses on the delivery of four key priorities around: Operations, People, Stakeholders and Technology. Operationally, this includes enhancing their intelligence capability and making the best use of the tools and resources available to them, to progress their cases fairly and effectively.

19. Technology priorities include enhancing the use of Artificial Intelligence, predictive analysis and a new document and case management system to improve the management and review of the vast quantities of evidential material they collect. On People, the SFO's increased core budget will enable them to deliver a new workforce structure and recruit and retain permanent skilled staff, continuing the downward trend in the percentage of temporary to permanent staff.

Communication with those under investigation:

20. It should also be noted that the CPS are not investigators and cannot direct investigators on cases. The SFO try to provide as much information as they can to those under investigation without compromising law enforcement work or prejudicing the right of defendants to a fair trial. In practice the amount of

information they can provide to suspects is usually very limited and they cannot provide a running commentary on live operations.

6. A lack of awareness of and training on the Bribery Act may be a contributing factor in the lack of bribery prosecutions. The Government should provide the resources for the City of London Police's Economic Crime Academy to expand its anti-bribery training programme, and should ensure that every police force has at least one senior specialist officer who has undertaken the training. (Paragraph 85)

21. The Government recognises that there is a need to improve awareness of Bribery Act offences among police forces and committed in the 2017 UK Anti-Corruption Strategy to strengthening law enforcement capacity and capability through an innovative counter bribery and corruption training programme. This training programme is available through the City of London Police Economic Crime Academy.

22. At this time the Government contends that there is not enough evidence to commit to providing the resources for the City of London Police's Economic Crime Academy to expand its anti-bribery training programme and for every police force to have at least one senior specialist officer undertake the training.

23. The Government considers that there are potentially more effective methods of raising awareness of bribery and corruption offences than providing training to a single officer from each force and the Home Office will scope options for raising awareness and capability in conjunction with City of London Police.

7. The OECD has criticised a lack of co-operation and co-ordination between the many different bodies involved in the investigation and prosecution of bribery. We wait to see whether the National Economic Crime Centre will provide the necessary central focus. The Scottish prosecution authorities should have a permanent presence. (Paragraph 93)

24. In March 2019, the Government completed a follow-up report which detailed the progress made in implementing the OECD Anti-Bribery Convention since its Phase 4 evaluation in 2017. In the report, the Government successfully addressed the OECD's previous concerns over a lack of co-operation and co-ordination between investigatory and prosecutorial bodies. The OECD recognised the measures taken to improve co-ordination and communication between law enforcement authorities from England and Wales and those in Scotland. Following the follow-up report, the OECD considered its Phase 4 recommendations in this area to be fully implemented.

25. The Government's efforts have included expanding the SFO-led Bribery and Corruption Threat Group to additional government bodies. The Group is designed to ensure multi-agency co-ordination and meets on a quarterly basis. The Group tends to focus on international bribery and corruption, particularly bribery committed by UK companies and individuals in international business transactions. The group comprises of key departments and agencies which have potential for detecting and/or investigating bribery. The group was originally comprised SFO, CPS, Department for International Development (DFID), Financial Conduct Authority (FCA), Foreign and Commonwealth Office (FCO), Home Office, HMRC, Ministry of Defence Police, Regional Organised Crime Unit network, and the National Crime Agency (NCA). The new members of the threat group are Department for International Trade (DIT), Ministry of Defence, The Crown Office and Procurator Fiscal Service (COPFS) and UK Export Finance. Membership of the Group is periodically reviewed to determine which departments or agencies are appropriate to attend, based upon their potential for detecting overseas bribery and corruption.
26. In relation to the FCA, the OECD recognised that coordination mechanisms have been put in place between the FCA and SFO to discuss investigations, sharing of intelligence, and to consider whether bribery matters should be taken forward either by the SFO, the FCA or both in a coordinated way. Consequently, the previous recommendation in relation to the FCA is considered to be fully implemented by the OECD.
27. In relation to the role of Scottish authorities since the Phase 4 evaluation in 2017 Scottish prosecutors (COPFS) and Police Scotland were invited to attend Clearing House meetings. The NECC-hosted Clearing House meetings are a mechanism which allows relevant law enforcement agencies to decide on case allocation and deconflict bribery cases. In addition to determining which agency should take a particular operation forward, the meetings provide for a productive environment to raise awareness of ongoing cases in other law enforcement agencies. A senior prosecutor from the Serious Organised Crime Division and a senior representative from Police Scotland first attended meetings in April 2017 and are regular attendees. These organisations have confirmed these meetings are a useful tool both in terms of information sharing about investigations and learning from the experience of colleagues across UK agencies.
28. In addition to Clearing House attendance, the Tackling Foreign Bribery Memorandum of Understanding (MoU) was refreshed in May 2017 to include COPFS (covering Police Scotland) as participants. COPFS and the SFO hold regular liaison meetings and the MoU between these two prosecutors was refreshed in December 2018 to reflect current organisational structures and post-holders.

29. The establishment of the National Economic Crime Centre (NECC) ensures an additional mechanism for sharing information across all levels of law enforcement and between different agencies. The NECC's initial capabilities started in October 2018 and will develop and evolve throughout 2019 and beyond. As referenced in the report, a key part of the NECC's remit is to task and coordinate the overall law enforcement response for economic crime. The extent to which the NECC is comprised of a cross-cutting team (NCA, FCA, HMRC, City of London Police, CPS, Home Office, SFO and Private Sector) underlines this key function.

30. Police Scotland have been involved in discussions regarding the NECC and a senior officer from Police Scotland's Economic Crime Unit attends multi-force meetings at the NECC on a regular basis. Police Scotland are also in regular contact with the NECC in relation to ongoing investigations which cross UK jurisdictions.

31. The make-up of the NECC is under constant review due to operational requirements. Police Scotland already play an active role in the NECC and COPFS is arranging for the Lord Advocate and senior officials to visit the NECC, with a view to putting in place appropriate arrangements to ensure there is effective liaison and communication between Scottish authorities and NECC representatives and partner agencies.

8. The current requirement for prosecutions to be initiated only with the written consent of one of the Directors is too rigid. Subsections (3) to (7) of section 10 of the Act should be repealed and replaced by a provision allowing the Directors to delegate the power to initiate proceedings to officials, as they see fit. Subsections (8) to (10) should be repealed and equivalent provisions substituted for Northern Ireland. (Paragraph 101)

32. We do not agree with the Committee's recommendation on the current consent procedure for prosecutions under the Bribery Act. Neither the CPS or SFO agreed that the permission requirements are too rigid or burdensome and can see no current need to delegate this particular statutory power.

33. Although the current permission arrangements might appear inflexible, it is still considered that they are proportionate and necessary, reflecting the serious nature of this type of offending. As the Committee will be aware, the current requirements actually replaced the previous ones for this type of offence that were even less flexible and meant that the Attorney General was the only person able to provide consent to prosecute them.

34. Given that the number of Bribery Act cases is still relatively low overall, we do not yet have evidence from prosecutors or stakeholders that the current arrangements are impeding prosecutions. The SFO is a small organisation which takes on only a

few of the most serious and complex cases and therefore caseloads are never likely to be high. However, if it was ever to become clear that investigations and prosecutions were regularly being impeded by the current permission requirement, then the Government would look to examine the relevant provisions and consider whether a review of these arrangements was appropriate.

9. There are arguments for amending the general law to make corporations vicariously liable for offences committed by their employees and agents. However, this goes beyond offences under the Bribery Act. We do not make any recommendation for a change in the law. (Paragraph 109)

35. We thank the Committee for this observation on vicarious liability. The Committee's report explored many of the arguments surrounding the extension of a failure to prevent model to economic crimes beyond bribery and tax evasion, highlighting the complex nature of this area of the law.

36. The Call for Evidence on Corporate Criminal Liability for Economic Crime explored this question in detail. It sought evidence on the extent to which the identification doctrine is deficient as a tool for effective enforcement of the criminal law against large modern companies. It explored options for reform of the law and views on which of the options proposed would be most effective. The Government has been carefully considering the evidence submitted since the Call for Evidence closed in March 2017 and a response will be issued shortly.

10. Ensuring that the Government's Anti-Corruption Champion is a sufficiently high-level office-holder, with appropriate access to other ministers and senior officials, is crucial for ensuring that decisions relating to corruption are acted on and seen through to completion. We believe that the right individual should be a minister to have the necessary influence to act as the Government's Anti-Corruption Champion, and should be provided with the appropriate support and resources. (Paragraph 115)

37. The Anti-Corruption Champion plays a key role in driving the UK's Anti-Corruption agenda. This is an important Prime Ministerial appointment that is made on merit. The Government believes that the Champion's ability to ensure delivery of Anti-Corruption initiatives is not predicated by the level of any other posts held by the office holder, but is demonstrated by the impact which they have in this role. The current Anti-Corruption Champion has driven progress across this brief, both while serving as a backbench MP and now as a Minister. Throughout his role, the Champion has had regular access to ministers and officials, including through the Anti-Corruption Inter-Ministerial Group which he co-chairs and which sets and monitors actions for Government departments, in line with the Anti-Corruption Strategy. He also engages with the Prime Minister to ensure she is updated on developing issues in this area. The Government's Joint Anti-Corruption Unit, which

is based in the Home Office, provides the appropriate resources, private office and dedicated policy support to the Anti-Corruption Champion.

Corporate hospitality

11. We believe the attempts in the Ministry of Justice Guidance to explain the boundary between bribery and legitimate corporate hospitality are as clear as can be expected in the absence of any judicial interpretation of these provisions. Nevertheless, initially the Act may have had an overly deterrent effect. The Ministry of Justice should consider adding to the Guidance clearer examples of what might constitute acceptable corporate hospitality. (Paragraph 131)

38. We thank the Committee for acknowledging the Ministry of Justice (MoJ) Guidance provides as clear an explanation as possible of the boundary between bribery and legitimate corporate hospitality in the absence of judicial interpretation of these provisions. The Bribery Act was clearly never intended to prohibit reasonable and proportionate hospitality or other similar business expenditure, but the Government does not consider that it would be best placed to provide the bespoke, or more detailed clarification that the Committee suggests.

39. The MoJ Guidance was drafted in a deliberately high-level, non-prescriptive way to encourage organisations to examine their own internal systems and procedures. As the Committee suggests, there are other organisations on a level closer to business such as professional organisations or trade associations that could provide sector specific guidance on where to draw appropriate lines on corporate hospitality. In addition to this, other sources of more detailed guidance already exist, such as that given by Transparency International, in particular, which has produced guidance regarding adequate procedures and the Bribery Act which can be found at <https://www.transparency.org.uk/publications/adequate-procedures-guidance-to-the-uk-bribery-act-2010/>, along with further general anti-bribery guidance at <https://www.antibriberyguidance.org/>.

Bribery of foreign public officials, and facilitation payments (section 6)

12. We agree with all our witnesses that it would be a retrograde step to legalise facilitation payments. All trends in the law in other jurisdictions are towards abolishing a facilitation defence. We do not recommend any change in the law. (Paragraph 146)

40. The Government strongly agrees with the Committee's conclusion that it would be a retrograde step to legalise facilitation payments. There are no plans to change the law in this regard. It remains the Government's position that facilitation payments are a form of bribery and should not be legalised.

13. The Government must ensure that UK companies are provided with support on corruption issues in the countries to which they export, by properly trained and instructed officials. Even the smaller UK embassies must have at least one official who is expert in the local customs and cultures, or who can rapidly contact officials of foreign government departments on behalf of companies facing problems in this field. (Paragraph 152)

41. We welcome this recommendation, which is in line with the Government's Anti-Corruption Strategy¹ particularly actions 5.11 and 5.12 to strengthen the support that is available to companies and to provide digital content on training with integrity. The DFID-funded Business Integrity Initiative (BII) is currently undertaking pilot work in Kenya, Mexico and Pakistan. This aims to identify appropriate ways to support UK companies operating in these markets and will provide new guidance and tools for staff in post. We are looking across HMG teams at post to consider the best way to provide this support. Staff at post will also be provided with regular updates on best practice and latest thinking through the BII Newsletter, including links to other resources and the newly launched, bespoke service for which companies can apply.
42. The DIT is currently supporting DFID to connect with UK businesses who could benefit from the support services offered through the BII. Further, as evidence from the BII pilot emerges, DIT will consider how to include business integrity work in its future activity, potentially through Official Development Assistance (ODA) programming, in compliance with the International Development Act.
43. Action point 5.13 of the Anti-Corruption Strategy commits to "provide training and resources that improve the awareness and understanding of corruption amongst UK embassy staff. This will include up-to-date guidance on how to report offences under the UK Bribery Act to law enforcement and guidance on how to promote standards of trade integrity." The FCO's Diplomatic Academy currently offers an online module on Anti-Corruption for staff in relevant roles. The FCO also provides an Anti-Corruption toolkit to all staff which includes information on how to report cases of bribery to the relevant law enforcement agencies and aims to improve the awareness and understanding of corruption amongst all staff.
44. The amount of time staff at post can devote to the issue will depend on the size of the post and British companies' interest in the market. Any response will need, in any case, to draw on expertise from across the office, in local customs and cultures,

¹ See Page 56 of the Government's Anti-Corruption Strategy
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/66722/1/6_3323_Anti-Corruption_Strategy_WEB.pdf.

but also to get any sector-specific knowledge and experience, which is often very necessary.

45. Officials do not take up specific cases with foreign governments, but HMG, as part of our economic diplomacy work, is able to raise more general issues where, for instance, companies report a lack of transparency, slow processing of documents, inconsistency in applying regulations and taxes, etc.

Brexit issues

- 14. It is clear that the fight against international bribery will be significantly impeded if there are not in force between the United Kingdom and the participating Member States of the EU, even for a short time, measures with equivalent effect to the European Arrest Warrant, the European Investigation Order and other EU mechanisms for investigation and enforcement. We hope that all those involved in the Brexit negotiations, for the EU as well as the UK, will bear this in mind. (Paragraph 166)**

46. The Withdrawal Agreement reached with the EU would provide for an implementation period during which the Government would continue to use all the EU security tools it uses now, including the European Arrest Warrant and the European Investigation Order. This would smooth the transition to its new relationship and is in the UK's best interests. The Government's position remains that exiting with a deal is in the UK's best interests.

47. In preparation for a no deal scenario, the Government has been working closely with operational partners to move law enforcement co-operation to alternative, non-EU mechanisms on a contingency basis. This includes arrangements for extradition and mutual legal assistance. Broadly speaking, these alternative non-EU mechanisms would mean making more use of Interpol, Council of Europe Conventions and bilateral channels. Whilst these alternatives are not like-for-like replacements, they are largely tried and tested mechanisms because they are already used for cooperating with many non-EU countries. Preparations in each of the Member States are also an essential part of making the contingency arrangements as effective as possible, and to that end the Government has led an extensive programme of engagement with EU Member State counterparts to ensure it is collectively ready to operate the alternative mechanisms if needed in a no deal scenario.

Failure to prevent bribery (section 7)

15. The Ministry of Justice should, in consultation with representatives of the business community, and especially of SMEs, expand the section 9 Guidance to give more examples and to suggest procedures which, if adopted by SMEs, are likely to provide a good defence. (Paragraph 193)

16. The Guidance should make clear that all businesses need to conduct a risk assessment, that all but the smallest are likely to need procedures tailored to their particular needs, and that staff will need to be trained to understand and follow those procedures. (Paragraph 194)

17. Once that Guidance has been amended, the Quick Start Guide should be withdrawn. (Paragraph 195)

48. A joint response has been provided to recommendations 15, 16 and 17 which all focus on the MoJ Guidance to the Act.

49. The Government does not agree with these recommendations. As made clear in the response to recommendation 11, the Guidance was only ever intended to provide general procedural guidance. It was deliberately not prescriptive but is certainly not a one-size-fits-all document. It is rather an outline 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.

50. The Government does not consider that it is best placed to provide and neither would it be right for government or the prosecution agencies to give more examples or to suggest procedures that would be likely to provide a good defence. Companies should consult qualified legal and compliance professionals when evaluating their organisation's compliance with relevant laws and regulations, or in the case of SMEs seek the support provided by trade bodies such as the Federation of Small Businesses.

51. However, in line with its response to recommendation 31, the Government will seek to explore opportunities for improving general awareness of the Guidance with business representative bodies, particularly in respect of SMEs.

18. We believe that it is unnecessary to amend the wording of section 7 of the Act, but that the statutory Guidance should be amended to draw attention to the different wording in the Criminal Finances Act 2017 and in the HMRC Guidance to that Act, and to make clear that "adequate" does not mean, and is not

intended to mean, anything more stringent than “reasonable in all the circumstances”. (Paragraph 211)

52. Although the Criminal Finances Act and the Bribery Act both introduced failure to prevent offences, they are two separate pieces of legislation which involve offences for different forms of economic crime. Therefore, any change in the statutory Guidance which draws a comparison between the two will need to be carefully considered.

53. While this will of course be a matter for the courts in any individual case, as noted by the Committee, it appears very unlikely that a company which had in place anti-bribery procedures which were reasonable in all the circumstances but did not prevent bribery taking place on a specific occasion, would be unable to use the section 7 defence. As the Committee itself remarked, this is a distinction without a difference and to date there have been no reported problems with interpretation in respect of either Act. Should that position change, the Government will undertake to examine the issue again.

19. In this field, as in any other, it is for companies and their advisers to determine whether activities they propose to undertake or procedures they propose to adopt will comply with the law. Government departments and agencies can and do issue general guidance, but it is not their task to give advice in individual cases. The Serious Fraud Office should not revive the practice they once adopted of offering such advice. (Paragraph 217)

54. The Government acknowledges the Committee’s conclusion on giving individual advice to companies on activities or procedures. As already noted earlier in this response, more bespoke and tailored advice is available from other sources. The general Bribery Act Guidance can be found with wider Anti-Corruption guidance on issues such as whistleblowing or taking disciplinary action against employees on GOV.UK at the following link <https://www.gov.uk/anti-bribery-policy>.

20. We hope the Government will delay no more in analysing the evidence it received two years ago and in reaching a conclusion on whether to extend the “failure to prevent” offence to other economic crimes. (Paragraph 231)

55. The Government agrees that it is important that the response to the Call for Evidence on Corporate Criminal Liability for Economic Crime should issue soon. As set out in response to recommendation 9, the potential extension of the section 7 ‘failure to prevent’ model was only one of the options considered in the Call for Evidence.

21. If Government action includes further legislation, a decision will have to be reached on the wording of any due diligence defence. On the assumption, which we believe to be correct, that there is no intended or actual difference in meaning between “adequate” procedures and procedures which are “reasonable in all the

circumstances”, we believe the latter more clearly gives the intended meaning. (Paragraph 232)

56. The Government notes the Committee’s observation on this point and concurs the issue will very likely be considered in the event it is decided to proceed to extend the section 7 model to other forms of economic crime.

Deferred prosecution agreements

22. Schedule 17 to the Crime and Courts Act 2013 should be amended to give the court greater discretion to manage the preliminary and final hearings in whatever way seems most appropriate. However, a declaration approving a DPA and giving the reasons for it must be made in open court. (Paragraph 247)

57. The Government notes the Committee’s recommendation on the discretion of the courts in DPA hearings and the case for giving DPA approval reasons in open court. However, the justification given for making these changes to the Act is by way of two case examples only. The Government will therefore consider the case for making these recommended changes to the Crime and Courts Act 2013 if further compelling evidence is received, but for the present it has no plans to implement either of these recommendations.

23. We conclude that the legislation and the two sets of Guidelines, read together, provide adequate guidance, first to the prosecutors and then to the courts, on how to exercise their undoubtedly very broad discretion governing the level of financial penalty and the discount which should apply in any particular case. (Paragraph 306)

58. We welcome the Committee’s observation that the legislation and two sets of Guidelines, when read together, provide adequate guidance to both prosecutors and courts on how to exercise their discretion.

24. When the Sentencing Guidelines for Fraud, Bribery and Money Laundering are next amended, they should make clear that they apply not just to sentences for those crimes, but also to the calculation of financial penalties in the case of deferred prosecution agreements, whether for offences under the Bribery Act or for other offences for which DPAs are permissible. (Paragraph 307)

59. The Government notes the Committee’s observation on the sentencing guidelines for fraud, bribery and money laundering. Whilst the Sentencing Council is an independent body, we will ensure the organisation is made aware of this recommendation.

25. If self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not. (Paragraph 309)

60. The Government notes this observation. In order to enter a DPA the prosecutor must be satisfied that the public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with a company in accordance with the criteria set out in the DPA Code of Practice. The court takes an active role in examining the agreement and, as is evident from the published rulings, scrutinises every aspect of the application for approval very carefully.

61. Prosecutors will always consider each case on its merit, taking account of the facts of the case, the Public Interest and the willingness of the company to make full reparations. Reform, including the removal of senior managers who are either implicated in, or who should have been aware of the criminality the court is considering has been a key element in all of the judgments it has handed down.

62. DPAs are pragmatic devices aimed first at incentivising openness leading to the uncovering of financial crimes; and secondly at allowing companies to account to a court for those crimes in a way that does not also punish its innocent employees, suppliers and the local community in which it operates. That second rationale only comes into play if the company can show the prosecutor and the court that it will not create new victims of crime. That is why, in SFO's XYZ case, the fuller version of the judge's comment on openness was, "*...it is important to send a clear message, reflecting a policy choice in bringing DPAs into the Law of England and Wales, that a company's shareholders, customers and employees (as well as those with whom it deals) 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.*"

63. In the Rolls Royce case the court approved a 50% discount even though it was not a case of self-reporting. In his judgment Lord Justice Leveson made the following comment:

"In this case, Rolls-Royce has demonstrated extraordinary cooperation (as explained at [16] to [20] above). The co-operation is reflected in part by the willingness to enter a DPA but it also falls within the principle to which I have referred. Summarising, it includes voluntary disclosure of internal investigations, with limited waiver of privilege over internal investigation memoranda and certain defence aerospace and civil aerospace material (for count 11); providing un-reviewed digital material to the SFO and co-operating with independent counsel in the resolution of privilege claims; agreeing to the use of digital methods to identify privilege issues; co-operating with the SFO's requests in respect of the conduct of the internal investigation, to include timing of and recording of interviews and

reporting of findings on a rolling basis; providing all financial data sought and fully co-operating with the assessments which had to be undertaken; not winding up companies of interest including RRESI.

Two further points ought to be made. At the request of the SFO, Rolls-Royce identified conduct which might be capable of resolution by a DPA prior to any invitation to enter into DPA negotiations being made. Thus, a potential route map through this exceptional case was assisted by the co-operation provided. Second, Rolls-Royce have not sought to generate any external influence over the investigation by the SFO; media enquiries and Whitehall engagement has been handled in a manner agreed with the SFO.

In order to take account of this extraordinary cooperation, I repeat the views which I expressed above and confirm that a further discount of 16.7% is justified taking the total discount of the penalty to 50%.”

26. Although, strictly speaking, our recommendations are confined to offences under the Bribery Act, it would be invidious to have different provisions for other offences which can be the subject of DPAs. (Paragraph 310).

64. The Government acknowledges the Committee’s point but has no further comment at present.

27. We share the strongly held views of our witnesses that the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted. (Paragraph 315).

65. The Government shares the views expressed to the Committee on the introduction of DPAs. It was always intended that DPAs would ensure that companies are held to account and incentivise self-reporting and cooperation with investigations, they are not an alternative measure to the prosecution of individuals who commit wrongdoing. Prosecution decisions are a matter for the prosecution agencies which retain the authority and expertise in any individual prosecution.

28. In negotiations for a DPA, the co-operation expected of a company must include provision of all available evidence which might implicate any individuals, however senior, who are suspected of being involved in the bribery being considered. (Paragraph 317)

66. The Director of the SFO will shortly publish guidance for corporates who wish to self-report, setting out what factors may be considered as indicating full and genuine cooperation, a pre-requisite before any consideration of inviting a company to enter into DPA negotiations.

67. This will include the prosecutor assessing whether the corporate has provided assistance that is genuinely proactive and goes above and beyond what the law requires; identified suspected wrongdoing and criminal conduct together with the people responsible, regardless of their seniority or position in the corporate; and the provision of all available evidence that might implicate any individuals.

29. We do not believe that the adoption of non-prosecution agreements along the lines of the United States model would add anything of value to the current law on DPAs. (Paragraph 324)

68. The Government concurs with the Committee's view and assessment on this issue.

30. We believe that in the short time they have been in operation deferred prosecution agreements have proved to be an excellent way of handling corporate bribery, providing an incentive for self-reporting and for cooperating with the authorities. (Paragraph 328).

69. The Government notes that the Committee's view that the introduction of DPAs in 2014 has been a successful way of handling corporate bribery and providing an incentive for self-reporting and cooperation with investigations.

Small and medium enterprises

31. We conclude that, although small and medium enterprises may have particular problems with complying with the Act, the difficulties are not of such a scale as to make it necessary for them to have any special statutory exemptions. However, the Government should improve the situation of small and medium enterprises by taking steps to inform them better of the Ministry of Justice Guidance, for instance by circulating the Guidance to Chambers of Commerce and trade associations. (Paragraph 345)

70. The Government notes the Committee's conclusion on the necessity of special Bribery Act exemptions for SME's. Currently, small businesses can find information about bribery and how to comply with legislation at <https://www.gov.uk/anti-bribery-policy>, which sets out the government's Anti-Corruption policy and includes a copy of the Bribery Act 2010 Guidance. The Business Support Helpline also provides information and advice to small businesses in England. Should a small business contact the helpline to seek guidance about anti-bribery policy they will be referred by a call handler to the webpage mentioned above. Businesses in Scotland, Northern Ireland and Wales can access similar phone services.

71. As stated earlier in this response, the government will work with business representative bodies to further raise awareness of the issue of bribery, compliance with the Bribery Act 2010, and the above guidance amongst the small business community.

32. The webpages of the Department for International Trade (DIT) which are intended to help exporters should in the case of each country refer to any specific problems with bribery and corruption, and in particular to whether there are likely to be expectations of facilitation payments, and to the fact that these are illegal under UK law. There should be a link to the Ministry of Justice Guidance. (Paragraph 351)

72. The DIT recognises the importance of clearly displaying information that explains the risks associated with anti-bribery and corruption within trade. Historically this content has been scattered over departmental channels, including MoJ, DFID and DIT. To make this easier, DIT has been undertaking a collaborative approach to export advice. The first stage was to ensure that generic export promotion and guidance is in one place – great.gov.uk. There is live content already in place that links to MoJ and other useful sources including DFID <https://www.great.gov.uk/advice/manage-legal-and-ethical-compliance/understand-business-risk-in-overseas-markets/>.

73. The second stage is to provide more specific guidance at a market level on both GOV.UK and great.gov.uk. On 11th April this year DIT launched its new market-based export information service on great.gov.uk for 5 key markets, with new markets to be added every week: <https://www.great.gov.uk/markets/>.

74. In collaboration with DFID, they have inserted market specific integrity content into 3 markets as a pilot. If the pilot proves successful, it will be rolled out to all markets. This specific project kicked off in the week commencing 15th April 2019. Great.gov.uk is the home for market promotional content, whilst legislative information sits on GOV.UK in country guides. These are out of date and will be archived in the coming months. DIT have developed 'no deal' specific guides that can replace them and will commence work on 'deal' guides as soon as there is more clarity. Once this content is more stable, links will be added to legislative information on bribery and Anti-Corruption.

75. In addition to market specific integrity guidance DIT are also developing a 'Business Integrity Hub' landing page: a page which brings together in one place DFID's service offer, and signposts companies to other sources of useful information on business integrity.

The position in Scotland

33. We see no reason for any change in the law and practice regulating the commencement of proceedings under the Bribery Act in Scotland. (Paragraph 359)

76. The Government notes the Committee's view on this issue.

34. The Secretary of State for Justice should amend the Guidance published under section 9 so that it deals adequately with the law and practice in Scotland. The Ministry of Justice and the Crown Office should ensure that each of their websites refers to both their sets of Guidance. (Paragraph 364)

77. The Lord Advocate agreed, when giving evidence before the Committee, that there could be clearer flagging of the fact that Scotland is a separate legal jurisdiction and of the particular responsibilities of the COPFS in Scotland. Given the Ministry of Justice has no current plans to amend the section 9 guidance for any other reason, the COPFS and Scottish Government will liaise with the MoJ to clarify what minor amendments to the guidance might be made to clarify and expand upon these points when it is proposed that the guidance is next amended.

78. The COPFS has created a dedicated page on its website which contains information about the approach taken to investigating and prosecuting bribery and corruption in Scotland, with a view to making this information more accessible to businesses and the public. The page contains a link to the MoJ Guidance, as well as a copy of the COPFS Guidance, and other materials.

35. We invite the Scottish Government to consider adopting a system analogous to the DPA regime. This would ideally have a full statutory basis, and would include the requirement of judicial approval, the ability to impose a financial penalty in addition to the disgorgement of profits, and a high degree of transparency. (Paragraph 377)

79. Since a system of DPAs was introduced in England and Wales in 2014, the Scottish Government has considered carefully whether to introduce a system of DPAs in Scotland. This consideration has taken place within the context of the continued successful operation of the self-reporting scheme.

80. Whilst it is acknowledged that the self-report scheme operates differently to a system of DPAs, it is considered that it does have a number of distinctive features and strengths.

81. In order to benefit from the self-report scheme, the company must conduct a thorough investigation of the circumstances, disclosing the full extent of the criminal conduct which has been discovered. This may include conduct which could not be established by evidence sufficient to include on an indictment and which could not,

accordingly, be reflected in a DPA. The company bears the responsibility and the costs for the investigation. Transparency is ensured by the publicity afforded to the civil settlements and this will be enhanced by the publication of further materials on the dedicated COPFS webpage. The requirement for the business to put in place remedial measures to avoid a recurrence of the corruption is another key feature.

82. In this context there are no immediate plans to legislate to introduce a system of DPAs in Scotland. This will continue to be kept under review as part of the legislative priorities of the Scottish Government and Scottish Parliament. The OECD recommendation, which is referred to in the report of the House of Lords Select Committee, was that Scotland consider adopting a scheme comparable to the DPA scheme, and it is noted that the OECD Working Group has now marked this recommendation as fully implemented, the OECD being satisfied that the matter has been fully considered by the Scottish authorities.

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