

BUSINESS LIABILITY FOR CORRUPTION

WHAT DOES PRIVATE SECTOR NEED TO KNOW?

GUIDELINES ON APPLICATION OF PROVISIONS OF THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION.

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GUIDELINES ON APPLICATION OF PROVISIONS OF THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION

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INTRODUCTION

THE PHENOMENON OF CORRUPTION IN PRIVATE SECTOR OF UKRAINE HAS BEEN RESEARCHED AND ANALYZED FAIRLY RECENTLY. THE IMPETUS FOR THIS BECAME THE COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION RATIFIED IN 2006 AND THE UNITED NATIONS CONVENTION AGAINST CORRUPTION THAT DEMAND INTRODUCTION OF RESPONSIBILITY FOR CORRUPTION IN PRIVATE SECTOR. CONSEQUENTLY, ON THE 11TH OF JUNE 2009 THE UKRAINIAN PARLIAMENT PASSED THE LAWS OF UKRAINE ON LIABILITY OF LEGAL ENTITIES FOR CORRUPTION-RELATED OFFENCES AND ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE REGARDING LIABILITY FOR CORRUPT OFFENCES. THESE ACTS ESTABLISH THE ADMINISTRATIVE LIABILITY OF A LEGAL ENTITY FOR CORRUPT OFFENSES FOR THE FIRST TIME.

UNFORTUNATELY, THESE LAWS HAVE STOPPED BEING VALID IN EARLY 2011 AFTER BEING IN FORCE ONLY FOR FEW DAYS. SUBSEQUENTLY OTHER LAWS WERE ADOPTED WHICH REGULATE THE CRIMINAL LIABILITY FOR CORRUPTION IN PRIVATE SECTOR (APRIL, 2011)¹ AND PARTIALLY THE CRIMINAL LIABILITY OF A LEGAL ENTITY (MAY, 2013)².

THE ACTIONS OF LAW ENFORCEMENT AUTHORITIES IN MAKING INDIVIDUALS ACCOUNTABLE FOR CORRUPT OFFENCES THAT TAKE PLACE IN PRIVATE SECTOR ARE VERY PROACTIVE AND DO NOT ENCOUNTER ANY PARTICULAR DIFFICULTIES.

MEANWHILE, THE LEGAL NORM OF THE LEGAL ENTITY RESPONSIBILITY FOR CORRUPTION WAS VIGOROUSLY DEBATED IN THE SOCIETY EVEN PRIOR TO ITS ESTABLISHMENT. EVEN NOW, AFTER A YEAR WHEN THE LAW HAS BEEN PASSED, THE DEBATES REGARDING ITS PROVISIONS DO NOT STOP. EACH OF LOBBYISTS FOR THE ABOLITION OR FUNDAMENTAL REVISION OF THE LAW HAS A SPECIFIC ARGUMENT TO SUPPORT THEIR OWN POSITION - THE SCIENCE PROVED TO BE UNPREPARED FOR SUCH CALL TO CHANGE THE DOCTRINE, BUSINESSES FEAR THE POSSIBLE REPRISALS BY THE LAW ENFORCEMENT AUTHORITIES, LAWYERS AND POLITICIANS, IN THEIR TURN, RESPOND TO THE MOODS OF POTENTIAL CLIENTS AND VOTERS.

THIS MEANS THAT THE IMPLEMENTATION OF THE LAW CAN RUN

1 ON THE 7TH OF APRIL 2011 THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE ON LIABILITY FOR CORRUPT OFFENSES WAS PASSED.

2 ON THE 23RD OF MAY 2013 THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION WAS PASSED BY THE UKRAINIAN PARLIAMENT. THE ADOPTION OF THIS LAW IS DIRECTED AT THE IMPLEMENTATION OF OBLIGATIONS BY UKRAINE, PROVIDED BY A NUMBER OF INTERNATIONAL LEGISLATIVE ACTS SUCH AS THE UNITED NATIONS CONVENTION AGAINST THE TRANSNATIONAL ORGANIZED CRIME AND AGAINST CORRUPTION, THE COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION, AND ALSO THE RECOMMENDATIONS OF THE GROUP OF STATES AGAINST CORRUPTION (GRECO) AND EUROPEAN COMMISSION WITHIN THE FRAMEWORK OF THE ACTION PLAN ON THE LIBERALIZATION OF THE VISA REGIME WITH THE EU.

INTO THE RISKS OF NOT BEING ACTUALLY FULFILLED OR INTO THE IMPROPER EXECUTION OF ITS PROVISIONS. THEREFORE, IT IS IMPORTANT TO HOLD A NATIONWIDE DISCUSSION REGARDING THE CONTENT OF THE LAW AND ITS OVERALL SIGNIFICANCE FOR THE BUSINESSES AND THE STATE. MOREOVER, THIS TYPE OF DISCUSSION WOULD GIVE AN OPPORTUNITY FOR ALL THE PARTIES TO EXPRESS THEMSELVES AND FIND A COMPROMISE ON THE ISSUES WHERE THERE ARE OPPOSING VIEWS. IN THE CONTEXT OF THE ENACTMENT OF THE LAW THE DIALOGUE WITH BUSINESSES GAINS A PARTICULAR IMPORTANCE - QUIET OFTEN THE MASS MEDIA WAS WARNING THAT THE PROVISIONS OF THE LAW COULD BE USED TO SEIZE THE ENTERPRISE OR TO DEAL WITH POLITICAL OR BUSINESS RIVALS.

THEREBY, TRANSPARENCY INTERNATIONAL UKRAINE SUPPOSES THAT IT IS NECESSARY TO LAUNCH SUCH DISCUSSION INVOLVING GOVERNMENT, CIVIL SOCIETY, BUSINESSES AND ALSO THE INTERNATIONAL PARTNERS. IN ORDER TO HELP WITH THE COLLABORATION OF ALL PARTIES OF THE DIALOGUE, THE CLARIFICATION OF PROVISIONS OF THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION IS NEEDED IN THE FORM OF GUIDELINES. THIS TYPE OF THE DOCUMENT WILL ALSO CONTAIN RECOMMENDATIONS FOR BUSINESSES ON WHICH MEASURES SHOULD BE TAKEN TO PREVENT CORRUPT OFFENSES WITHIN THE ACTIVITIES OF COMMERCIAL ENTERPRISES.

AS AN EXAMPLE WE HAVE CHOSEN THE GUIDANCE ON THE PROCEDURES WHICH RELEVANT COMMERCIAL ORGANIZATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING. THE GUIDANCE WAS PREPARED TO IMPLEMENT THE BRIBERY ACT 2010 WHICH WAS PASSED IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND³. THE LEGAL AND THE LAW ENFORCEMENT SYSTEMS OF GREAT BRITAIN HAVE DEVELOPED THEIR OWN EFFECTIVE APPROACH TO COUNTERACT CORRUPTION IN PRIVATE SECTOR. THEIR ACQUIRED EXPERIENCE OF PROSECUTION OF THOSE RESPONSIBLE PERSONS IS ONE OF THE MOST VALUABLE FOR STUDYING BY UKRAINIAN GOVERNMENTAL BODIES, CIVIL SOCIETY, AND BUSINESSES AND BY THE COMMUNITY OF PROFESSIONAL LAWYERS.

IT IS ALSO IMPORTANT TO HIGHLIGHT THAT THESE GUIDELINES ARE ONLY A FIRST PROJECT WHICH HAS TO BE REVISED IN ABOUT A YEAR AFTER THE ENACTMENT OF THE LAW REGARDING THE LEGAL ENTITY LIABILITY, WITH CONSIDERATION OF ITS APPLICATION BY THE COURTS AND THE LAW ENFORCEMENT AUTHORITIES.

3 [HTTP://WWW.JUSTICE.GOV.UK/DOWNLOADS/LEGISLATION/BRIBERY-ACT-2010-GUIDANCE.PDF](http://www.justice.gov.uk/downloads/legislation/brbribery-act-2010-guidance.pdf)

INTERNATIONAL OBLIGATIONS OF UKRAINE

BRIEF OVERVIEW OF THE INTERNATIONAL APPROACHES

TO IMPLEMENT THE LIABILITY OF LEGAL ENTITIES

UKRAINE IS A PARTICIPANT OF ALL THE MOST IMPORTANT INTERNATIONAL LEGAL INSTRUMENTS FOR FIGHTING AGAINST CRIME. THE OVERWHELMING MAJORITY OF THEM ACKNOWLEDGE THE LEGAL NORM OF THE LEGAL ENTITY LIABILITY AS ONE OF THE MOST EFFECTIVE MEASURES TO COUNTERACT DIFFERENT TYPES OF CRIMINAL ACTIVITY.

FOR THE PURPOSE OF THESE RECOMMENDATIONS, IT IS ADVISABLE TO LOOK MORE CLOSELY AT THOSE INTERNATIONAL OBLIGATIONS WHICH ARE DIRECTLY LINKED TO THE COUNTERACTING CORRUPTION. THE UN CONVENTION AGAINST THE TRANSNATIONAL ORGANIZED CRIME⁴ (ARTICLE 10) AND THE UN CONVENTION AGAINST CORRUPTION⁵ (ARTICLE 26) INCLUDE ONLY THE GENERAL OBLIGATIONS OF THE PARTIES TO TAKE MEASURES TO RESOLVE THE ISSUE OF LIABILITY OF LEGAL ENTITIES ACCORDING TO THE PRINCIPLES OF THEIR LEGAL SYSTEMS. THE COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION REGULATES THE ISSUES OF LIABILITY OF LEGAL ENTITIES MORE DETAILED⁶.

THUS, ARTICLES 18 AND 19 OF THE CONVENTION ESTABLISH COMPULSORY STANDARDS WHICH SHOULD BE IMPLEMENTED IN THE NATIONAL LEGISLATION. IN PARTICULAR, THE CONVENTION RECOGNIZES THAT:

1) LEGAL ENTITIES CAN BE BROUGHT TO LIABILITY FOR THE COMMITMENT OF CRIMES SUCH AS BRIBERY, TRADING INFLUENCE AND MONEY LAUNDERING;

2) THE GROUNDS OF LIABILITY OF A LEGAL ENTITY ARE THE FOLLOWING:

2.1 COMMITMENT FOR THE BENEFIT OF THE LEGAL ENTITY OF A CRIME BY AN INDIVIDUAL WHO HOLDS A SENIOR POSITION WITHIN THIS LEGAL ENTITY AND HAS THE AUTHORITY TO REPRESENT THE ENTITY OR MAKE DECISIONS ON BEHALF OF IT OR MONITOR THE ACTIVITIES OF A LEGAL ENTITY;

2.2 LACK OF EFFECTIVE CONTROL OR SUPERVISION BY THE MANAGERS OF THE LEGAL

ENTITY, WHICH LEADS TO THE CORRUPTION OFFENCE BY THE SUBORDINATES FOR THE BENEFIT OF THIS LEGAL ENTITY.

3) LIABILITY OF THE LEGAL ENTITY DOES NOT INCLUDE THE LIABILITY OF THE INDIVIDUALS, GUILTY OF THE CRIME;

4) SANCTIONS, IMPOSED ON LEGAL ENTITIES, SHOULD BE EFFECTIVE, PROPORTIONATE AND DISSUASIVE AND PARTICULARLY INCLUDE MONETARY SANCTIONS;

5) MEANS OF COMMITTING CORRUPT OFFENSES AND INCOME, RECEIVED AS A RESULT OF THE CRIME, SHOULD BE CONFISCATED.

⁴ [HTTP://ZAKON2.RADA.GOV.UA/LAWS/SHOW/995_789#FIND](http://zakon2.rada.gov.ua/laws/show/995_789#Find)

⁵ [HTTP://ZAKON3.RADA.GOV.UA/LAWS/SHOW/995_c16](http://zakon3.rada.gov.ua/laws/show/995_c16)

⁶ [HTTP://CONVENTIONS.COE.INT/TREATY/COMMUN/QUEVOULEZVOUS.ASP?CL=ENG&NT=173](http://conventions.coe.int/Treaty/Commun/QueVoulezVous.ASP?CL=ENG&NT=173)

ARTICLE 18 – LEGAL ENTITY LIABILITY

1. EACH PARTY SHALL ADOPT SUCH LEGISLATIVE AND OTHER MEASURES AS MAY BE NECESSARY TO ENSURE THAT LEGAL ENTITIES CAN BE BROUGHT TO LIABILITY FOR CRIMINAL OFFENCES OF ACTIVE BRIBERY, TRADING IN INFLUENCE AND MONEY LAUNDERING ESTABLISHED IN ACCORDANCE WITH THIS CONVENTION, COMMITTED FOR THEIR BENEFIT BY ANY INDIVIDUAL, ACTING EITHER INDIVIDUALLY OR AS A PART OF A BODY OF THE LEGAL ENTITY, WHO HAS A LEADING POSITION WITHIN THE LEGAL ENTITY, BASED ON:

- REPRESENTATION POWER OF THE LEGAL ENTITY; OR
- AN AUTHORITY TO TAKE DECISIONS ON BEHALF OF THE LEGAL ENTITY; OR
- AN AUTHORITY TO EXERCISE CONTROL OVER THE LEGAL ENTITY ACTIVITY;

AS WELL AS FOR INVOLVEMENT OF SUCH INDIVIDUAL AS AN ACCESSORY OR INSTIGATOR IN THE ABOVEMENTIONED OFFENCES.

2. APART FROM THE CASES ALREADY PROVIDED IN PARAGRAPH 1, EACH PARTY SHALL TAKE THE NECESSARY MEASURES TO ENSURE THAT A LEGAL ENTITY CAN BE BROUGHT TO LIABILITY WHERE THE LACK OF SUPERVISION OR CONTROL BY AN INDIVIDUAL REFERRED TO IN PARAGRAPH 1 HAS MADE POSSIBLE THE COMMISSION OF THE CRIMINAL OFFENCES MENTIONED IN PARAGRAPH 1 FOR THE BENEFIT OF THAT LEGAL ENTITY BY AN INDIVIDUAL UNDER ITS AUTHORITY.

3. LIABILITY OF A LEGAL ENTITY UNDER PARAGRAPHS 1 AND 2 SHALL NOT EXCLUDE CRIMINAL PROCEEDINGS AGAINST INDIVIDUALS WHO ARE PERPETRATORS, INSTIGATORS OF, OR ACCESSORIES TO, THE CRIMINAL OFFENCES MENTIONED IN PARAGRAPH 1.

ARTICLE 19 – SANCTIONS AND MEASURES

1. HAVING REGARD TO THE SERIOUS NATURE OF THE CRIMINAL OFFENCES ESTABLISHED IN ACCORDANCE WITH THIS CONVENTION, EACH PARTY SHALL PROVIDE, IN RESPECT OF THOSE CRIMINAL OFFENCES ESTABLISHED IN ACCORDANCE WITH ARTICLES 2 TO 14, EFFECTIVE, PROPORTIONATE AND DISSUASIVE SANCTIONS AND MEASURES, INCLUDING, WHEN COMMITTED BY INDIVIDUALS, PENALTIES INVOLVING DEPRIVATION OF LIBERTY WHICH CAN GIVE RISE TO EXTRADITION.

2. EACH PARTY SHALL ENSURE THAT LEGAL ENTITIES CAN BE BROUGHT TO LIABILITY IN ACCORDANCE WITH ARTICLE 18, PARAGRAPHS 1 AND 2, SHALL BE SUBJECT TO EFFECTIVE, PROPORTIONATE AND DISSUASIVE CRIMINAL OR NON-CRIMINAL SANCTIONS, INCLUDING MONETARY SANCTIONS.

3. EACH PARTY SHALL ADOPT SUCH LEGISLATIVE AND OTHER MEASURES AS MAY BE NECESSARY TO ENABLE IT TO CONFISCATE OR OTHERWISE DEPRIVE THE INSTRUMENTALITIES AND PROCEEDS OF CRIMINAL OFFENCES ESTABLISHED IN ACCORDANCE WITH THIS CONVENTION, OR PROPERTY THE VALUE OF WHICH CORRESPONDS TO SUCH PROCEEDS.

THE SUPERVISION OF THE IMPLEMENTATION OF THE OBLIGATIONS WITHIN THE FRAMEWORK OF THE CRIMINAL LAW CONVENTION AGAINST CORRUPTION IS DONE BY THE GROUP OF STATES AGAINST CORRUPTION (GRECO). THUS, THE FOURTH ADDITIONAL REPORT OF THE GRECO REGARDING THE ASSESSMENT OF THE IMPLEMENTATION OF THE RECOMMENDATIONS BY UKRAINE AS A RESULT OF THE FIRST AND THE SECOND ROUNDS OF MONITORING STATES THAT UKRAINE HAS ONLY PARTLY FULFILLED THE OBLIGATIONS. THIS IS DUE TO THE FACT THAT AT THE TIME OF THE ADOPTION OF THE REPORT (MARCH, 2014) THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION

OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION WAS PASSED, HOWEVER, THE ISSUES OF LEGAL ENTITY LIABILITY IN CASE OF UNDUE CONTROL OVER THE ACTIONS OF THE EMPLOYEES THAT LED TO THE COMMITMENT OF THE CORRUPTION OFFENSE WAS LEFT UNRESOLVED. THE NEXT ASSESSMENT ON THE PROGRESS OF IMPLEMENTATION AND OF THIS RECOMMENDATION IN PARTICULAR BY GRECO WILL TAKE PLACE IN 2015. THE ASSESSMENT WILL INCLUDE THE ANALYSIS TO INDICATE WHETHER THE LAW PASSED MEETS THE REQUIREMENTS OF THE CRIMINAL LAW CONVENTION AGAINST CORRUPTION, ANALYSIS OF THE APPLICATION OF THIS LAW AND ON ITS BASIS THE OVERALL ASSESSMENT OF THE COMPLIANCE WITH THE

REQUIREMENTS OF CONVENTION.

NOWADAYS THERE IS NO ONE SINGLE APPROACH TO WHICH TYPE OF MEASURES SHOULD BE APPLIED TO THE LEGAL ENTITIES FOR COMMITTING CORRUPT OFFENSES. LEGAL INTERNATIONAL TOOLS GIVE THE STATES AN OPPORTUNITY TO CHOOSE THE MEASURES FOR THEMSELVES: CRIMINAL, ADMINISTRATIVE AND LEGAL OR CIVIL. FUNDAMENTALLY IMPORTANT IS ONLY THE FACT THAT THE SANCTIONS SHOULD BE EFFECTIVE, PROPORTIONATE AND DISSUASIVE (SECOND PART OF ARTICLE 19 OF THE CRIMINAL LAW CONVENTION AGAINST CORRUPTION).

MOST OF THE COUNTRIES WHERE LEGAL SYSTEMS INCLUDE THE LEGAL ENTITY LIABILITY HAVE CHOSEN THE CRIMINAL LIABILITY (THE USA, CANADA, FRANCE, UK, AUSTRALIA, SWITZERLAND, DENMARK, FINLAND, NETHERLANDS, ISRAEL, ESTONIAN, GEORGIA, LATVIA, LITHUANIA, MOLDOVA, AND ROMANIA). SOME COUNTRIES SUCH AS THE CZECH REPUBLIC AND LUXEMBOURG HAVE RECENTLY OPTED OUT OF ADMINISTRATIVE LIABILITY IN FAVOR OF THE CRIMINAL ONE.

A NUMBER OF STATES HAVE CHOSEN ADMINISTRATIVE LIABILITY (GERMANY, BRAZIL, GREECE AND BULGARIA) OR QUASI-CRIMINAL LEGAL ENTITY LIABILITY (UKRAINE, SWEDEN, ITALY, SLOVAKIA, AND AZERBAIJAN). THESE TWO TYPES OF LIABILITY ARE INHERENTLY VERY SIMILAR - FOR COMMITTING OF THE CRIMINAL CORRUPTION OFFENSE BY THE INDIVIDUALS THE SANCTIONS IN THE CRIMINAL OR ADMINISTRATIVE PROCEEDINGS ARE APPLIED TO THE LEGAL ENTITIES.

UKRAINE HAS CHOSEN QUASI-CRIMINAL LEGAL ENTITY LIABILITY FOR CORRUPT OFFENSES COMMITTED BY THE REPRESENTATIVES OF THE LEGAL ENTITIES. ACCORDING TO THE INITIATORS OF THE LAW (MINISTRY OF JUSTICE) THIS APPROACH HAS THE FOLLOWING ADVANTAGES:

1) THE LINK WITH THE CRIMINAL PROCEDURE THAT GIVES AN OPPORTUNITY TO:

- MORE EFFECTIVELY COLLECT THE EVIDENCE DURING THE CRIMINAL PROCEEDING (ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT (OECD) CRITICIZES ALL THE COUNTRIES THAT HAVE IMPLEMENTED ADMINISTRATIVE LIABILITY);
- ENSURE THE CONFISCATION OF THE CRIMINALLY ACQUIRED PROPERTY (THE CODE OF UKRAINE ON ADMINISTRATIVE OFFENCES DOES NOT INCLUDE SUCH A POSSIBILITY);
- PROVIDE A LINK BETWEEN PROSECUTION OF THE GUILTY ONES AND LEGAL ENTITY LIABILITY;

2) GREATER SCOPE OF RIGHTS FOR THE DEFENSE IN COMPARISON WITH THE PROCEEDINGS IN THE CASES OF ADMINISTRATIVE LIABILITY;

3) THE SANCTIONS HAVE ADMINISTRATIVE AND LEGAL NATURE HOWEVER THE PROCEEDINGS ARE MADE BY THE GUARANTEES OF THE CRIMINAL PROCEEDINGS. THE AMOUNT OF ADMINISTRATIVE PENALTY MAY HAVE FEATURES OF THE CRIMINAL PENALTIES (ACCORDING TO THE PRACTICES OF THE EUROPEAN COURT OF HUMAN RIGHTS), THEREFORE IT IS NECESSARY TO PROVIDE ADEQUATE GUARANTEES OF PROTECTION.

ON THE BASIS OF LEGAL INTERNATIONAL DOCUMENTS ON COMBATING CORRUPTION AND ALSO THE INTERNATIONAL EXPERIENCES, ESPECIALLY OF THOSE COUNTRIES WITH CUSTOMARY LEGAL SYSTEMS, THE TWO MAIN APPROACHES HAVE BEEN FORMED TO DETERMINE THE TERM OF THE LEGAL ENTITY LIABILITY FOR CORRUPT OFFENSES. THE FIRST ONE INVOLVES BLAMING THE LEGAL ENTITIES FOR THE ACTIONS OF ITS AGENTS (PERSONALIZED APPROACH), THE SECOND-LEGAL ENTITY GUILT OF LEGAL ENTITIES FOR COMMITTING AN OFFENSE.

1. BLAMING THE LEGAL ENTITIES FOR THE ACTIONS OF ITS AGENTS (IMPUTATION THEORIES)

THIS APPROACH IS BASED ON IDENTIFYING THE PERSON WHICH WAS ACTION ON BEHALF OF AND FOR THE BENEFITS OF THE LEGAL ENTITY. IT IS DIVIDED INTO TWO MODELS:

VICARIOUS LIABILITY - legal entity viability following the actions of its agents (employees or other individuals that work for the legal entity), committed for the benefit of the legal entity. This approach is used particularly in the United States in Foreign Corrupt Practices Act, 1977. This theory is based on the legal doctrine of 'respondeat superior', according to which the employer is responsible for the action of its employees in certain cases. In the Law of Ukraine this approach appears in article 1172 of the Civil Code which provides for legal entity liability for the harm caused due to the fault of the employee;

IDENTIFICATION THEORY ('ALTER EGO' THEORY) - this theory is very similar to the previous one. The difference is that the legal entities are responsible for the actions of individuals which perform the

senior functions in these entities. This approach is based on the fact that the will of the most senior officials is the will of the legal entities⁷. The article 18 of the Council of Europe Criminal Law Convention against Corruption provides this approach: it links the legal entity liability with the actions of the most senior officials of the legal entity, who can use the executive powers of the legal entity or the powers of monitoring activities of the legal entities. Identification theory is reflected in the legislation of Georgia, Slovenia, Australia and Canada.

THE CORRUPTION OFFENSE (SECOND PART OF THE ARTICLE 18 OF THE CRIMINAL LAW CONVENTION AGAINST CORRUPTION)⁹.

2. OBJECTIVE THEORY

THIS APPROACH IS MORE COMPREHENSIVE AND INVOLVES THE RESPONSIBILITY OF THE LEGAL ENTITY FOR THE LACK OF MEASURES TO PREVENT ITS EMPLOYEES OF COMMITTING CORRUPT OFFENSES. MOREOVER, IT ALSO HOLDS THE LEGAL ENTITIES LIABLE FOR THE EXISTENCE OF A CERTAIN LEGAL ENTITY CULTURE THAT DIRECTLY OR INDIRECTLY STIMULATES (PROVOKES) TO ACT IN A CORRUPT WAY FOR THE BENEFIT OF THE LEGAL ENTITY.

THIS APPROACH IS USED IN THE BRIBERY ACT ADOPTED IN THE UK IN 2010. THUS, THE ACT PROVIDES FOR LIABILITY FOR "THE FAILURE BY THE COMMERCIAL ORGANIZATION TO PREVENT BRIBERY": TO PROSECUTE THE LEGAL ENTITY IT IS ENOUGH TO PROVIDE A FACT THAT ANY INDIVIDUAL ASSOCIATED WITH THE ORGANIZATION HAS BRIBED ANOTHER INDIVIDUALS FOR THE PURPOSE OF ACQUIRING A RIGHT FOR THE ORGANIZATION TO PURSUE OR CONTINUE THE COMMERCIAL ACTIVITIES OR RECEIVE A RIGHT FOR THE COMPANY TO OBTAIN OR RETAIN BENEFITS IN COMMERCIAL ACTIVITIES.

THE EXISTENCE WITHIN THE ACTIVITIES OF THE LEGAL ENTITIES THE LEGAL ENTITY CULTURE OF CORRUPTION IS ONE OF THE GROUND FOR HOLDING THE LEGAL ENTITIES LIABLE ACCORDING TO THE AUSTRALIAN CRIMINAL LAW: THE LEGAL ENTITY IS ACCOUNTABLE IS IT DIRECTLY, INDIRECTLY OR SECRETLY AUTHORIZED OR ALLOWED TO COMMIT A CRIME. ONE WAY OF AUTHORIZING OR PERMITTING TO COMMIT A CRIME IS CONSIDERED "LEGAL ENTITY CULTURE, WHICH DIRECTED, ENCOURAGED, TOLERATED OR LED TO DISRUPTION OF THE REQUIREMENTS FOR PREVENTING CORRUPTION" OR "FAILURE TO CREATE A LEGAL ENTITY CULTURE FOR THE PREVENTION OF CORRUPTION"⁸.

THE MODEL THAT UKRAINE HAS CHOSEN IS BASED ON TRUNCATED "IDENTIFICATION THEORY"- A LEGAL ENTITY IS RESPONSIBLE FOR THE ACTIONS INDIVIDUALS WHO WERE GIVEN AUTHORITY BY THIS LEGAL ENTITY. AT THE SAME TIME THE CHANGES AS OF 13 MAY 2014 RESOLVED THE ISSUE OF LIABILITY FOR THE LACK OF PROPER SUPERVISION BY THE AUTHORIZED PERSONS OF THE LEGAL ENTITY WHICH LED TO

7 [HTTP://WWW.OECD.ORG/CORRUPTION/ANTI-BRIBERY/39200754.PDF](http://www.oecd.org/corruption/anti-bribery/39200754.pdf), P.8.

8 [HTTP://WWW.OECD.ORG/CORRUPTION/ANTI-BRIBERY/39200754.PDF](http://www.oecd.org/corruption/anti-bribery/39200754.pdf), P.10.

9 [HTTP://ZAKON4.RADA.GOV.UA/LAWS/SHOW/994_101](http://zakon4.rada.gov.ua/laws/show/994_101)

KEY PROVISIONS OF THE LAW OF UKRAINE

REGARDING THE APPLICATION OF THE CRIMINAL LAW TO LEGAL ENTITIES

THE APPLICATION OF CRIMINAL LAW TO LEGAL ENTITIES HAS BEEN MADE POSSIBLE UNDER THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION ADOPTED IN 2013 AND ALSO UNDER THE FURTHER AMENDMENTS PASSED INTO LAW ON 15TH APRIL AND 23RD MAY 2014.

1. THE PURPOSE OF THE LAW

AMENDMENTS TO THE LAW ON LEGAL ENTITY LIABILITY ARE INTENDED PRIMARILY TO PROTECT THOSE LEGAL ENTITIES THAT OPERATE HONESTLY AND DO NOT USE ILLEGAL METHODS TO OBTAIN BENEFITS FOR THE OPERATION OF THEIR BUSINESS. ON THE OTHER HAND, THE LAW PROVIDES FOR THE MEASURES REGARDING LEGAL ENTITY LIABILITY OF THOSE LEGAL ENTITIES THAT TRY TO USE ILLEGAL AND NON-MARKET METHODS OF COMPETITION AND ALSO THOSE WHO ARE INVOLVED IN SOCIALLY DANGEROUS ACTIVITIES SUCH AS MONEY LAUNDERING AND TERRORISM.

BESIDES, THE LAW PROVIDES LIABILITY OF THE LEGAL ENTITIES OF THE PUBLIC LAW FOR COMMITTING BY THEIR AGENTS A NUMBER OF THE MOST DANGEROUS CRIMES AGAINST THE STATE. THESE AMENDMENTS WERE MADE TO THE CRIMINAL CODE OF UKRAINE TOGETHER WITH THE ADOPTION OF THE LAW OF UKRAINE ON PROTECTION OF RIGHTS AND FREEDOMS OF CITIZENS AND LEGAL REGIME ON THE TEMPORARY OCCUPIED TERRITORY OF UKRAINE. THE NEED FOR THE NEW REGULATION CAME ABOUT AS A RESULT OF THE CRIMINAL ACTIONS REGARDING THE OCCUPATION OF THE TERRITORY OF THE AUTONOMOUS REPUBLIC OF CRIMEA, ILLEGAL SEIZURE OF PROPERTY AND A NUMBER OF OTHER ACTIONS CARRIED OUT BY THE RUSSIAN FEDERATION AS AN INVADER WHICH REQUIRED RESPONSES INVOLVING THE METHODS OF THE CRIMINAL LAW.

2. TYPES OF CRIMES, WHICH ALLOW THE APPLICATION TO LEGAL ENTITIES OF THE CRIMINAL LAW

THE CRIMINAL CODE OF UKRAINE PROVIDES THAT LEGAL ENTITIES CAN BE HOLD ACCOUNTABLE FOR THEIR AUTHORIZED PERSONS COMMITTING CRIMES SUCH AS:

- **BRIBERY, TRADING INFLUENCE (PART ONE AND TWO OF ARTICLE 3683, PART ONE AND TWO OF ARTICLE 3684, ARTICLES 369, 3692 OF THE CRIMINAL CODE OF UKRAINE);**
- **MONEY LAUNDERING (ARTICLES 209, 306 OF THE CRIMINAL CODE OF UKRAINE);**
- **CRIMES WHICH ARE LINKED TO TERRORISM (ARTICLES 258 – 2585 OF THE CRIMINAL CODE OF UKRAINE);**
- **CERTAIN CRIMES COMMITTED AGAINST NATIONAL SECURITY OF UKRAINE, WILL OF INDIVIDUAL, VOTING RIGHTS OF CITIZENS, SECURITY OF CIVIL SOCIETY, PEACE, SECURITY OF HUMANITY AND INTERNATIONAL ORDER (ARTICLES 109, 110, 113, 146, 147, 160, 260, 262, 436, 437, 438, 442, 444, 447 OF THE CRIMINAL CODE OF UKRAINE).**

THE PROSECUTION OF LEGAL ENTITIES FOR THE CRIMES LINKED TO CORRUPTION, MONEY LAUNDERING AND TERRORISM FOLLOWS DIRECTLY FROM THE INTERNATIONAL TREATIES THAT UKRAINE HAS SIGNED. APPLICATION OF CRIMINAL LAW FOR CERTAIN CRIMES AGAINST NATIONAL SECURITY OF UKRAINE, WILL OF INDIVIDUAL, VOTING RIGHTS OF CITIZENS, PEACE, SECURITY OF HUMANITY AND INTERNATIONAL ORDER (ARTICLES 109, 110, 113, 146, 147, 160, 260, 262, 436, 437, 438, 442, 444, 447 OF THE CRIMINAL CODE OF UKRAINE) IS CLOSELY LINKED WITH THE NEED TO ACT AGAINST THOSE INVOLVED IN THE TEMPORARY OCCUPATION OF THE AUTONOMOUS REPUBLIC OF CRIMEA BY THE RUSSIAN FEDERATION.

3. GROUNDS FOR APPLICATION OF THE MEASURES OF CRIMINAL AND LEGAL NATURE CONCERNING TO LEGAL ENTITIES

ACCORDING TO THE ARTICLE 963 OF THE CRIMINAL CODE THE GROUNDS FOR APPLICATION OF THE MEASURES OF CRIMINAL AND LEGAL NATURE CONCERNING LEGAL ENTITIES ARE THE FOLLOWING:

- COMMITTING AN ACTIVE BRIBING OFFENSE, INFLUENCE ABUSE, LEGALIZATION (LAUNDRY) OF INCOMES, RECEIVED BY CRIMINAL WAY, OF THE MENTIONED OFFENSE AGAINST THE BASICS OF THE NATIONAL SAFETY OF UKRAINE, WILL OF A PERSON, ELECTION RIGHTS OF CITIZENS, CIVIL SOCIETY SAFETY, PEACE, SAFETY FOR PEOPLE AND INTERNATIONAL LEGAL ORDER BY ITS AUTHORIZED PERSON OR BY PROXY OR BY ORDER, FOR CONSPIRACY OR COMPLICITY OR IN OTHER WAY ON BEHALF OF AND IN THE INTERESTS OF A LEGAL ENTITY;
- COMMITTING OFFENSES, RELATED TO TERRORISM, BY ITS AUTHORIZED PERSON OR BY PROXY OR BY ORDER, FOR CONSPIRACY OR COMPLICITY OR IN OTHER WAY ON BEHALF OF A LEGAL ENTITY;
- FAILURE TO CARRY OUT THE DUTIES ON TAKING MEASURES FOR CORRUPTION PREVENTION WHICH CAUSES COMMITTING AN ACTING BRIBING OFFENSE, INFLUENCE ABUSE, LEGALIZATION (LAUNDRY) OF INCOMES, RECEIVED BY CRIMINAL WAY, WHICH ARE IMPOSED ON ITS AUTHORIZED PERSON BY LAWS OR STATUTORY DOCUMENTS OF A LEGAL ENTITY.

AUTHORIZED PERSONS OF A LEGAL ENTITY ARE SERVANTS OF LEGAL ENTITY, AS WELL AS OTHER PERSONS, WHO, IN ACCORDANCE WITH THE LAWS, STATUTORY DOCUMENTS OF A LEGAL ENTITY OR AGREEMENT, HAVE A RIGHT TO ACT ON BEHALF OF A LEGAL ENTITY.

THUS, THE OFFENSE, COMMITTED IN THE INTERESTS OF A LEGAL ENTITY, SHALL BE UNDERSTOOD AS COMMITTING A CRIME, IF IT IS AIMED AT OBTAINING UNDUE ADVANTAGE OR CREATING CONDITIONS FOR OBTAINING SUCH ADVANTAGE BY IT, AS WELL AS EVASION OF THE LIABILITY, PROVIDED BY LAW.

4. SUBJECT OF LIABILITY

FOR COMMITTING OFFENSES, RELATED TO BRIBERY, INFLUENCE ABUSE, LEGALIZATION (LAUNDRY) OF INCOMES, RECEIVED BY CRIMINAL WAY, MEASURES OF CRIMINAL AND LEGAL NATURE WILL BE APPLIED TO THE ENTERPRISES, ESTABLISHMENTS, ORGANIZATIONS, EXCEPT:

- PUBLIC AUTHORITIES, THE AUTHORITIES OF THE AUTONOMOUS REPUBLIC OF CRIMEA, SELF-GOVERNMENT BODIES;
- ORGANIZATIONS, ESTABLISHED BY THEM IN THE DETERMINED PROCEDURE, WHICH ARE FULLY FINANCED IN ACCORDANCE WITH THE STATE AND LOCAL BUDGETS;
- FUND OF OBLIGATORY STATE SOCIAL INSURANCE;
- FUND OF GUARANTEEING DEPOSITS OF INDIVIDUALS;
- INTERNATIONAL ORGANIZATIONS.

LIABILITY FOR OFFENSES, RELATED TO TERRORISM AND CERTAIN CRIMES AGAINST BASIC OF THE NATIONAL SAFETY OF UKRAINE, WILL OF A PERSON, ELECTION RIGHTS OF CITIZENS, CIVIL SAFETY, PEACE, SAFETY OF PEOPLE AND INTERNATIONAL LEGAL ORDER CAN BE HELD ON THE SUBJECTS OF PRIVATE AND PUBLIC LAW, RESIDENTS AND NON-RESIDENTS OF UKRAINE, THAT IS ALL LEGAL ENTITIES WITHOUT EXCEPTIONS.

5. SANCTIONS

LEGAL ENTITIES CAN BE IMPOSED WITH THE FOLLOWING MEASURES OF CRIMINAL AND LEGAL NATURE:

- A PENALTY (STARTING FROM FIVE THOUSAND TO SEVENTY FIVE THOUSAND NON-TAXABLE MINIMUM INCOMES OF CITIZENS) (STARTING FROM UAH 85 THOUSAND TO 1 MILLION UAH 275 THOUSAND) DEPENDING ON THE LEVEL OF OFFENSE SEVERITY.

IT SHOULD BE NOTED THAT COURT CAN APPLY PAYMENT INSTALLMENTS OF THE PENALTY IN CERTAIN PARTS FOR PERIOD UP TO THREE YEARS, DEPENDING ON PROPERTY STATE OF A LEGAL ENTITY.

- PROPERTY CONFISCATION (IN CASE OF LIQUIDATION OF A LEGAL ENTITY);
- LIQUIDATION OF A LEGAL ENTITY (FOR OFFENSES, RELATED TO TERRORISM, CERTAIN OFFENSES AGAINST BASICS OF THE NATIONAL SAFETY OF UKRAINE, WILL OF A PERSON, ELECTION RIGHTS OF CITIZENS, CIVIL SAFETY, PEACE, SAFETY OF PEOPLE AND INTERNATIONAL LEGAL ORDER).

IT SHOULD BE ALSO TAKEN INTO CONSIDERATION THAT IN ACCORDANCE WITH THE ARTICLE 96-10 OF CRIMINAL CODE OF UKRAINE, ON APPLYING MEASURES OF CRIMINAL AND LEGAL NATURE TO A LEGAL ENTITY THE COURT SHALL CONSIDER THE FOLLOWING:

- THE DEGREE OF SEVERITY OF THE COMMITTED OFFENSE BY ITS AUTHORIZED PERSON;
- THE DEGREE OF COMMITTING A CRIMINAL INTENT;
- THE AMOUNT OF DAMAGE, NATURE AND AMOUNT OF ILLEGAL ADVANTAGE, WHICH IS RECEIVED OR CAN BE RECEIVED BY A LEGAL ENTITY;
- THE MEASURES, TAKEN BY A LEGAL ENTITY TO PREVENT AN OFFENSE.

IN THIS RESPECT WE SHALL CONSIDER THE FOLLOWING. IN ACCORDANCE WITH THE AMENDMENTS TO THE CRIMINAL CODE OF UKRAINE, PROVIDED BY THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN THE SPHERE OF STATE ANTI-CORRUPTION POLICY IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION, ADOPTED BY VERKHOVNA RADA OF UKRAINE AS OF MAY 13, 2014, LEGAL ENTITIES WILL BEAR RESPONSIBILITY FOR FAILURE TO PROVIDE PERFORMANCE THE DUTIES ON TAKING MEASURES TO PREVENT CORRUPTION, WHICH CAUSES ACTIVE BRIBING, INFLUENCE ABUSE, LEGALIZATION (LAUNDRY) OF INCOMES, RECEIVED BY CRIMINAL WAY, IMPOSED ON ITS AUTHORIZED PERSON BY LAWS OR STATUTORY DOCUMENTS OF A LEGAL ENTITY.

IT MEANS THAT IF A LEGAL ENTITY CAN PROVE THAT IT HAS TAKEN PROPER MEASURES TO PREVENT AN OFFENSE, THE COURT CAN IMPOSE A MINIMUM POSSIBLE AMOUNT OF A PENALTY FOR COMMITTING A CORRESPONDING OFFENSE.

6. PROCEEDING PROCEDURE

PROCEEDINGS ON A LEGAL ENTITY WILL BE CARRIED OUT IN ACCORDANCE WITH THE PROVISIONS OF THE CRIMINAL PROCEEDINGS CODE OF UKRAINE AFTER ENTERING INFORMATION ON IT TO THE UNIFIED REGISTER OF PRE-TRIAL INVESTIGATIONS.

PROCEEDING MOMENT FOR ENTERING SUCH INFORMATION IS PRESENTATION OF NOTIFICATION TO AN INDIVIDUAL ON SUSPICION IN COMMITTING AN OFFENSE ON BEHALF OF AND IN INTERESTS OF A LEGAL ENTITY.

PROCEEDINGS CONCERNING A LEGAL ENTITY AND CRIMINAL PROCEEDING CONCERNING AN AUTHORIZED PERSON, WHO COMMITTED AN OFFENSE ON BEHALF OF AND IN INTERESTS OF A LEGAL ENTITY, WILL BE CARRIED OUT SIMULTANEOUSLY.

INTERESTS OF A LEGAL ENTITY IN THE PROCESS OF CARRYING

OUT PROCEEDING CONCERNING IT WILL BE PRESENTED BY A REPRESENTATIVE OF SUCH LEGAL ENTITY. SUCH REPRESENTATIVE CAN BE:

- A PERSON, WHO HAS A RIGHT TO BE DEFENSE COUNSEL IN CRIMINAL PROCEEDING;
- MANAGER OR OTHER PERSON, AUTHORIZED BY LAWS OR STATUTORY DOCUMENTS;
- EMPLOYEE OF A LEGAL ENTITY.

UNDER THE RESULTS OF CARRYING OUT THE PROCEEDING CONCERNING A LEGAL ENTITY THE COURT CAN TAKE DECISION ON:

- APPLYING MEASURES OF CRIMINAL AND LEGAL NATURE TO A LEGAL ENTITY;
- TERMINATION OF PROCEEDING ON A LEGAL ENTITY.

7. GROUNDS FOR DISMISSAL OF A LEGAL ENTITY FROM APPLICATION OF THE MEASURES OF CRIMINAL AND LEGAL NATURE

THE PROVISIONS OF CRIMINAL LEGISLATION ALSO PROVIDE THE PERIOD OF LIMITATION OF BRINGING TO RESPONSIBILITY. THUS, MEASURES OF CRIMINAL AND LEGAL NATURE ARE NOT APPLIED TO THE LEGAL ENTITIES IF AT THE DATE OF COMMITTING ANY OF THE MENTIONED OFFENSES BY ITS AUTHORIZED PERSON AND TO THE DATE, WHEN THE SENTENCE COMES INTO FORCE, PASSED THE FOLLOWING TERMS:

- THREE YEARS – IN CASE OF COMMITTING AN OFFENSE OF A MINOR OFFENSE;
- FIVE YEARS – IN CASE OF COMMITTING CRIMES OF MEDIUM GRAVITY;
- TEN YEARS – IN CASE OF COMMITTING SERIOUS CRIME;
- FIFTEEN YEARS – IN CASE OF COMMITTING EXTREMELY SERIOUS CRIME.

8. CIVIL AND LEGAL LIABILITY

ON APPLYING MEASURE OF CRIMINAL AND LEGAL NATURE A LEGAL ENTITY IS OBLIGED TO COMPENSATE SUFFERED DAMAGES AND LOSS IN FULL AMOUNT, AS WELL AS AMOUNT OF ILLEGAL ADVANTAGE, WHICH HAS BEEN OR CAN BE RECEIVED BY A LEGAL ENTITY.

FURTHERMORE, A LEGAL ENTITY BEARS CIVIL RESPONSIBILITY IN FULL AMOUNT FOR ILLEGALLY RECEIVED ADVANTAGE AND LOSS, CAUSED BY AN OFFENSE, COMMITTED BY THE STATE, SUBJECTS OF STATE PROPERTY OR STATE ADMINISTRATION IN CASE WHEN THE STATE OR SUBJECT OF THE STATE PROPERTY OWNS MORE THAN 25 PERCENT IN A LEGAL ENTITY OR A LEGAL ENTITY IS EFFECTIVELY CONTROLLED BY THE STATE OR SUBJECT OF STATE PROPERTY.

ESSENTIAL INFORMATION FOR BUSINESSES

REGARDING CORRUPTION PREVENTION IN PRIVATE SECTOR

THERE ARE GREAT NUMBER OF INTERNATIONAL LEGAL STANDARDS AND METHODOLOGICAL RECOMMENDATIONS IN THE SPHERE OF DEVELOPMENT OF INTERNAL SYSTEM FOR CORRUPTION PREVENTION IN LEGAL ENTITIES.

FIRST OF ALL, IT IS NECESSARY TO PAY ATTENTION ON THE ARTICLE 12 OF THE UN CONVENTION AGAINST CORRUPTION.

IN ACCORDANCE WITH THE FIRST AND SECOND PARTS OF THE ARTICLE 12 OF THE CONVENTION, MEMBER STATES TAKE MEASURES AIMED TO PREVENT CORRUPTION IN PRIVATE SECTOR, STRENGTHEN STANDARDS OF ACCOUNTING AND AUDIT IN PRIVATE SECTOR AND IN CERTAIN CASES IMPOSE PROPER EFFECTIVE AND RESTRAINING CIVIL AND LEGAL ADMINISTRATIVE OR CRIMINAL SANCTIONS FOR FAILURE TO TAKE SUCH MEASURES.

THE MEASURES INTENDED TO ACHIEVE THESE AIMS CAN INCLUDE:

PROMOTING THE DEVELOPMENT OF STANDARDS AND PROCEDURES DESIGNED TO SAFEGUARD THE INTEGRITY OF RELEVANT PRIVATE ENTITIES, INCLUDING CODES OF CONDUCT FOR THE CORRECT, HONOURABLE AND PROPER PERFORMANCE OF THE ACTIVITIES OF BUSINESS AND ALL RELEVANT PROFESSIONS AND THE PREVENTION OF CONFLICTS OF INTEREST, AND FOR THE PROMOTION OF THE USE OF GOOD COMMERCIAL PRACTICES AMONG BUSINESSES AND IN THE CONTRACTUAL RELATIONS OF BUSINESSES WITH THE STATE;

ENSURING THAT PRIVATE ENTERPRISES, TAKING INTO ACCOUNT THEIR STRUCTURE AND SIZE, HAVE SUFFICIENT INTERNAL AUDITING CONTROLS TO ASSIST IN PREVENTING AND DETECTING ACTS OF CORRUPTION AND THAT THE ACCOUNTS AND REQUIRED FINANCIAL STATEMENTS OF SUCH PRIVATE ENTERPRISES ARE SUBJECT TO APPROPRIATE AUDITING AND CERTIFICATION PROCEDURES.

IN ADDITION, SOME INTERNATIONAL ORGANIZATIONS HAVE APPROVED THEIR OWN STANDARDS ON CORRUPTION PREVENTION IN PRIVATE SECTOR. AMONG THEM THERE ARE THE FOLLOWING: RECOMMENDATIONS OF THE ORGANIZATION OF ECONOMICAL TRADE AND DEVELOPMENT ON THE BEST PRACTICES IN INTERNAL CONTROL, ETHICS AND PROVIDING THEIR IMPLEMENTATION (ANNEX 2 TO OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS), AS WELL AS BUSINESS PRINCIPLES OF

TRANSPARENCY INTERNATIONAL TO FIGHT BRIBING.

IN UKRAINE THE LAW ON GROUNDS OF CORRUPTION PREVENTION AND COUNTERACTION INVOLVES PROFOUND REGULATION OF THE ISSUES ON CORRUPTION PREVENTION IN PRIVATE SECTOR.

THUS, ACCORDING TO THE ARTICLE 13 OF THE LAW THE STATE PROMOTES CONSOLIDATION OF THE NORMS OF PROFESSIONAL ETHICS AND OTHER REQUIREMENTS CONCERNING PERFORMANCE OF CERTAIN TYPES OF ACTIVITY IN THE CODES OF CONDUCT OF SOLE PROPRIETORS AND REPRESENTATIVES OF THE RELEVANT PROFESSIONS. THE ARTICLE 14-1 OF THE LAW DETERMINES THAT LEGAL ENTITIES DEVELOP AND ASSUME ANTI-CORRUPTION MEASURES, WHICH ARE NECESSARY AND REASONABLE FOR PREVENTING CORRUPTION IN A LEGAL ENTITY ACTIVITY AND FOR ENCOURAGING ITS EMPLOYEES TO ACT IN ACCORDANCE WITH THE LAW AND OTHER REGULATORY ACTS.

UNFORTUNATELY, IN THE PROCESS OF WORK WITH THE DRAFT LAW ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION (REGISTRATION No. 4556) THE PROVISIONS OF THIS ARTICLE, WHICH HAD PROVIDED THE POSSIBILITY FOR PRIVATE SECTOR TO DETERMINE TYPES OF SUCH INTERNAL MEASURES, WERE REMOVED. THE DRAFT LAW DETERMINED THE FOLLOWING TYPES:

ESTABLISHING RULES AND PROCEDURES TO DETECT AND PREVENT CORRUPTION IN A LEGAL ENTITY ACTIVITY, DEVELOPING RECOMMENDATIONS ON THEIR IMPLEMENTATION, ESTABLISHING RULES OF PROFESSIONAL ETHICS OF THE LEGAL ENTITY'S EMPLOYEES, CREATING CONDITIONS FOR CONFIDENTIAL INFORMING ON THEIR OFFENCES;

DETERMINING PERSONS RESPONSIBLE FOR COMPLIANCE WITH THESE RULES AND PROCEDURES, AND PROVIDING REGULAR REPORTS UNDER THE MONITORING RESULTS TO THE OWNER/OWNERS OR AUTHORIZED REPRESENTATIVES OF THE LEGAL ENTITY

THE OWNER'S OR AUTHORIZED REPRESENTATIVES' PROPER SUPERVISION AND MONITORING OVER COMPLIANCE WITH THE RULES AND PROCEDURES ON DETECTING AND PREVENTING CORRUPTION IN THE LEGAL ENTITY ACTIVITY;

CONDUCTING REGULAR TRAINING OF THE PERSONS RESPONSIBLE FOR MONITORING OVER COMPLIANCE WITH RULES AND PROCEDURES ON DETECTING AND PREVENTING CORRUPTION;

CONDUCTING REGULAR ASSESSMENT OF EFFICIENCY IN APPLYING THE RULES AND PROCEDURES ON DETECTING AND PREVENTING CORRUPTION;

APPLYING THE MEASURES OF DISCIPLINARY LIABILITY TO THE PERSONS, WHO VIOLATE SUCH RULES AND PROCEDURES;

TAKING MEASURES TO REACT ON THE DETECTED FACTS OF CORRUPT VIOLATION, IN PARTICULAR, INFORMING THE AUTHORIZED STATE BODIES, CONDUCTING INTERNAL INVESTIGATION, DEVELOPING MEASURES FOR PREVENTION OF SUCH OFFENSES IN FUTURE.

THUS, PRIVATE SECTOR IN UKRAINE NOWADAYS SHALL CONSIDER THE INTERNATIONAL STANDARDS AND EXPERIENCE IN THE PROCESS OF FORMING ANTI-CORRUPTION PROGRAMS.

ACCORDING TO TRANSPARENCY INTERNATIONAL UKRAINE, KEY RECOMMENDATIONS FOR PRIVATE SECTOR IN UKRAINE, TAKING INTO CONSIDERATION THE ABOVEMENTIONED STANDARDS AND LEGISLATIONS OF UKRAINE, CAN BE THE FOLLOWING:

LEADERSHIP. A company shall have a clearly expressed will of the owner and management of the company to restrict any types of bribing and other unfair conduct. Such policy shall be explained to each employee of the company, and the owners and management of the company shall strictly adhere to it and implement it by their own example.

ANTI-CORRUPTION PROGRAMS. The company has to analyze possible corruption risks and other factors related to the company's ability to prevent corruption, conduct consultations with employees, trade unions, and prepare the program to prevent corruption on this basis.

The program shall reflect the company policy, rules and procedures to prevent and counteract corruption specific to the company, relations with other companies, number of employees and other peculiarities of the company. One of the most important components of the program shall be a scheme of corruption risks analysis, code of conduct for employees of the company and mechanisms to prevent, detect and solve conflict of interests.

One of the managers of the company shall be appointed as a responsible person for implementation of the anti-corruption program, its monitoring, revision, as well as imposing sanctions. The program revision shall be conducted regularly, based on the analysis of implementation of its measures.

The principles of corruption prevention, determined by the program, shall be applied in all types of the company's activity and its relations with the state, legal entities and individuals. The company shall ensure publicity the program content and shall be interested in external communications on the program implementation (for example, messages from other companies on possible facts of corrupt offenses).

Relations connected with selection, career advancement, and evaluation of performing duties by the staff shall be also regulated with consideration of the principles determined by the anti-corruption program of the company.

Companies shall ensure regular trainings both for management and other staff regarding the issues related to the anti-corruption policy of the company. Besides, they shall establish the mechanisms to provide advice for the staff on proper conduct in conditions of a potential conflict of interest or violation of anti-corruption rules.

The persons, who refuse to perform the instructions or orders connected with bribing or other types of corrupt behavior cannot be punished for such refusal and shall have the possibility to anonymously inform on these facts, in particular, via their internal mechanisms of the company. Fair message concerning suspicion in committing a corrupt offense cannot directly or indirectly entail bringing a person to any kind of liability.

INTERNAL CONTROL AND AUDIT. Companies shall conduct proper internal control over the implementation of measures determined by the anti-corruption program. Besides, the companies shall have an audit subdepartment (if the number of employees allows this), which on the basis of its own plan conducts regular audits.

EXTERNAL CONTROL. The company shall consider the possibility concerning external inspection of the company's anti-corruption policy implementation and possible publication of the results of such inspection.

PROPOSALS ON POLICY DEVELOPMENT

IN THE SPHERE OF CORRUPTION COUNTERACTION IN PRIVATE SECTOR

AFTER ADOPTION OF THE LAW OF UKRAINE ON AMENDMENTS TO SOME LEGISLATIVE ACTS OF UKRAINE IN ORDER TO IMPLEMENT THE ACTION PLAN FOR LIBERALIZATION OF THE VISA REGIME FOR UKRAINE ON THE LEGAL ENTITY LIABILITY BY THE EUROPEAN UNION BY VERKHOVNA RADA OF UKRAINE, SERIOUS LEGISLATIVE BASIS WAS ESTABLISHED TO ENSURE THE POSSIBILITY TO ASSUME MEASURES CONCERNING PROSECUTION OF LEGAL ENTITIES FOR CORRUPT OFFENSES.

HOWEVER, THE SUFFICIENT IMPLEMENTATION OF THIS LEGISLATION CAN BE ENSURED BY THE COMPLEX OF ACTIONS AGREED BY COMPETENT STATE BODIES, CIVIL SOCIETY AND BUSINESS.

IN THIS REGARD, ON OUR OPINION, THE FOLLOWING MEASURES SHALL BE TAKEN:

1) TO FORM THE WORKING GROUP CONSISTING OF PUBLIC BODIES' OFFICIALS, LAWYERS, CIVIL SOCIETY ACTIVISTS, AND BUSINESS COMMUNITIES FOR THE PURPOSE TO CONDUCT MONITORING OVER APPLYING LEGISLATION ON THE CRIMINAL AND LEGAL MEASURES' APPLICATION TO LEGAL ENTITIES, AND PREPARE THE AMENDMENTS TO THE LEGISLATION ON THE BASIS OF ANALYSIS OF THE MONITORING RESULTS;

2) TO DEVELOP THE STRATEGY ON SUPPORTING THE IMPLEMENTATION OF ANTI-CORRUPTION STANDARDS IN PRIVATE SECTOR TOGETHER WITH REPRESENTATIVES OF BUSINESS COMMUNITIES, UNIONS OF SOLE PROPRIETORS AND TRADE UNIONS (OECD GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE; TRANSPARENCY INTERNATIONAL BUSINESS PRINCIPLES FOR COUNTERING BRIBERY), AND PROMOTE SELF-REGULATION IN PRIVATE SECTOR;

3) TO ENSURE COOPERATION OF THE GOVERNMENT WITH BUSINESS AND CIVIL SOCIETY CONCERNING INTERPRETATION AND EXPERIENCE OF APPLICATION OF NEW ANTI-CORRUPTION STANDARDS DETERMINED BY THE LAW ON LIABILITY OF LEGAL ENTITIES FOR CORRUPT OFFENSES;

4) TO DEVELOP AND IMPLEMENT ON REGULAR BASIS THE SPECIAL PROGRAMS INTENDED TO ENSURE ACCESS OF COMPANIES TO NECESSARY INFORMATION

(ESPECIALLY ON ADMINISTRATIVE PROCEDURES, RIGHTS AND DUTIES OF COMPANIES) AND TO DEVELOP OF NEGATIVE ATTITUDE TO CORRUPTION, ENCOURAGE TO WHISTLEBLOW ABOUT CORRUPTION.

USEFUL REFERENCES:

1. **UN CONVENTION AGAINST CORRUPTION:**
[HTTP://ZAKON4.RADA.GOV.UA/LAWS/
SHOW/995_c16](http://zakon4.rada.gov.ua/laws/show/995_c16)
2. **CRIMINAL LAW CONVENTION ON CORRUPTION:**
[HTTP://ZAKON4.RADA.GOV.UA/LAWS/
SHOW/994_101](http://zakon4.rada.gov.ua/laws/show/994_101)
3. **OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, AND ADDITIONAL DOCUMENTS, IN PARTICULAR, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE:**
[HTTP://WWW.OECD.ORG/DAF/ANTI-BRIBERY/
CONVCOMBATBRIBERY_ENG.PDF](http://www.oecd.org/da/anti-bribery/convcombatbribery_eng.pdf)
4. **OECD RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES**
[HTTP://WWW.OECD.ORG/DAF/INV/
CORPORATERESPONSIBILITY/36885821.PDF](http://www.oecd.org/da/inv/corporateresponsibility/36885821.pdf)
5. **TRANSPARENCY INTERNATIONAL BUSINESS PRINCIPLES FOR COUNTERING BRIBERY:**
[HTTP://ACTOOLKIT.UNPRME.ORG/WP-CONTENT/
RESOURCEPDF/BUSINESS%20PRINCIPLES%20
FOR%20COUNTERING%20BRIBERY.PDF](http://actoolkit.unprme.org/wp-content/resourcepdf/business%20principles%20for%20countering%20bribery.pdf)
6. **TRANSPARENCY INTERNATIONAL BUSINESS PRINCIPLES FOR COUNTERING BRIBERY – SMALL AND MEDIUM ENTERPRISE (SME) EDITION:**
[HTTP://WWW.TRANSPARENCY.ORG/WHATWEDO/
TOOLS/BUSINESS_PRINCIPLES_FOR_
COUNTERING_BRIBERY_SME_EDITION/1](http://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery_sme_edition/1)
7. **UK BRIBERY ACT 2010:**
[HTTP://WWW.LEGISLATION.GOV.UK/
UKPGA/2010/23/CONTENTS](http://www.legislation.gov.uk/ukpga/2010/23/contents)
8. **UK BRIBERY ACT 2010 GUIDELINES:**
[HTTP://WWW.JUSTICE.GOV.UK/DOWNLOADS/
LEGISLATION/BRIBERY-ACT-2010-GUIDANCE.PDF](http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf)



Bribery Act 2010

CHAPTER 23

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SCHEDULE 1 — CONSEQUENTIAL AMENDMENTS



Bribery Act 2010

2010 CHAPTER 23

An Act to make provision about offences relating to bribery; and for connected purposes.
[8th April 2010]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

General bribery offences

1 Offences of bribing another person

(1) A person ("P") is guilty of an offence if either of the following cases applies. (2) Case 1 is where—

- (a) P offers, promises or gives a financial or other advantage to another person, and
- (b) P intends the advantage—
 - (i) to induce a person to perform improperly a relevant function or activity, or
 - (ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

- (a) P offers, promises or gives a financial or other advantage to another person, and
- (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

2 Offences relating to being bribed

(1) A person ("R") is guilty of an offence if any of the following cases applies.

- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
- (3) Case 4 is where—
 - (a) R requests, agrees to receive or accepts a financial or other advantage, and
 - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—
 - (a) by R, or
 - (b) by another person at R's request or with R's assent or acquiescence.
- (6) In cases 3 to 6 it does not matter—
 - (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
 - (b) whether the advantage is (or is to be) for the benefit of R or another person.
- (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
- (8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

3 Function or activity to which bribe relates

- (1) For the purposes of this Act a function or activity is a relevant function or activity if—
 - (a) it falls within subsection (2), and
 - (b) meets one or more of conditions A to C.
- (2) The following functions and activities fall within this subsection—
 - (a) any function of a public nature,
 - (b) any activity connected with a business,
 - (c) any activity performed in the course of a person's employment,
 - (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
- (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.
- (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
- (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
- (6) A function or activity is a relevant function or activity even if it—
 - (a) has no connection with the United Kingdom, and
 - (b) is performed in a country or territory outside the United Kingdom.

- (7) In this section “business” includes trade or profession.

4 Improper performance to which bribe relates

- (1) For the purposes of this Act a relevant function or activity—
- (a) is performed improperly if it is performed in breach of a relevant expectation, and
 - (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.
- (2) In subsection (1) “relevant expectation”—
- (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
 - (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.
- (3) Anything that a person does (or omits to do) arising from or in connection with that person’s past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

5 Expectation test

- (1) For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.
- (2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.
- (3) In subsection (2) “written law” means law contained in—
- (a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
 - (b) any judicial decision which is so applicable and is evidenced in published written sources.

Bribery of foreign public officials

6 Bribery of foreign public officials

- (1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P’s intention is to influence F in F’s capacity as a foreign public official.
- (2) P must also intend to obtain or retain—
- (a) business, or
 - (b) an advantage in the conduct of business.
- (3) P bribes F if, and only if—
- (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
 - (i) to F, or
 - (ii) to another person at F’s request or with F’s assent or acquiescence, and
 - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s

capacity as a foreign public official by the offer, promise or gift.

- (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
- (a) any omission to exercise those functions, and
 - (b) any use of F's position as such an official, even if not within F's authority.
- (5) "Foreign public official" means an individual who—
- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
 - (b) exercises a public function—
 - (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
 - (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
 - (c) is an official or agent of a public international organisation.
- (6) "Public international organisation" means an organisation whose members are any of the following—
- (a) countries or territories,
 - (b) governments of countries or territories, (c) other public international organisations, (d) a mixture of any of the above.
- (7) For the purposes of subsection (3)(b), the written law applicable to F is—
- (a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,
 - (b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,
 - (c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—
 - (i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
 - (ii) any judicial decision which is so applicable and is evidenced in published written sources.
- (8) For the purposes of this section, a trade or profession is a business.

Failure of commercial organisations to prevent bribery

7 Failure of commercial organisations to prevent bribery

- (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
- (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A—

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- (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
 - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
- (5) In this section— “partnership” means—
- (a) a partnership within the Partnership Act 1890, or
 - (b) a limited partnership registered under the Limited Partnerships Act 1907,
- or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
- “relevant commercial organisation” means—
- (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
 - (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
 - (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
 - (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
- and, for the purposes of this section, a trade or profession is a business.

8 Meaning of associated person

- (1) For the purposes of section 7, a person (“A”) is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.
- (2) The capacity in which A performs services for or on behalf of C does not matter.
- (3) Accordingly A may (for example) be C’s employee, agent or subsidiary.
- (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.
- (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

9 Guidance about commercial organisations preventing bribery

- (1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).
- (2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.
- (3) The Secretary of State must consult the Scottish Ministers before publishing anything under this section.
- (4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.

- (5) Expressions used in this section have the same meaning as in section 7.

Prosecution and penalties

10 Consent to prosecution

- (1) No proceedings for an offence under this Act may be instituted in England and Wales except by or with the consent of—
- (a) the Director of Public Prosecutions,
 - (b) the Director of the Serious Fraud Office, or
 - (c) the Director of Revenue and Customs Prosecutions.
- (2) No proceedings for an offence under this Act may be instituted in Northern Ireland except by or with the consent of—
- (a) the Director of Public Prosecutions for Northern Ireland, or
 - (b) the Director of the Serious Fraud Office.
- (3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person—
- (a) who is acting—
 - (i) under the direction or instruction of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions, or
 - (ii) on behalf of such a Director, or
 - (b) to whom such a function has been assigned by such a Director, except with the consent of the Director concerned to the institution of the proceedings.
- (4) The Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions must exercise personally any function under subsection (1), (2) or (3) of giving consent.
- (5) The only exception is if—
- (a) the Director concerned is unavailable, and
 - (b) there is another person who is designated in writing by the Director acting personally as the person who is authorised to exercise any such function when the Director is unavailable.
- (6) In that case, the other person may exercise the function but must do so personally.
- (7) Subsections (4) to (6) apply instead of any other provisions which would otherwise have enabled any function of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions under subsection (1), (2) or (3) of giving consent to be exercised by a person other than the Director concerned.
- (8) No proceedings for an offence under this Act may be instituted in Northern Ireland by virtue of section 36 of the Justice (Northern Ireland) Act 2002 (delegation of the functions of the Director of Public Prosecutions for Northern Ireland to persons other than the Deputy Director) except with the consent of the Director of Public Prosecutions for Northern Ireland to the institution of the proceedings.
- (9) The Director of Public Prosecutions for Northern Ireland must exercise personally any function under subsection (2) or (8) of giving consent unless the function is exercised personally by the Deputy Director of Public Prosecutions for Northern Ireland by virtue of section 30(4) or (7) of the Act of 2002 (powers of Deputy Director to exercise functions of Director).

- (10) Subsection (9) applies instead of section 36 of the Act of 2002 in relation to the functions of the Director of Public Prosecutions for Northern Ireland and the Deputy Director of Public Prosecutions for Northern Ireland under, or (as the case may be) by virtue of, subsections (2) and (8) above of giving consent.

11 Penalties

- (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
- (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum,
 - (b) on conviction on indictment, to a fine.
- (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
- (4) The reference in subsection (1)(a) to 12 months is to be read—
- (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
 - (b) in its application to Northern Ireland, as a reference to 6 months.

Other provisions about offences

12 Offences under this Act: territorial application

- (1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
- (2) Subsection (3) applies if—
- (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
 - (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
 - (c) that person has a close connection with the United Kingdom.
- (3) In such a case—
- (a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
 - (b) proceedings for the offence may be taken at any place in the United Kingdom.
- (4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—
- (a) a British citizen,
 - (b) a British overseas territories citizen, (c) a British National (Overseas),
 - (d) a British Overseas citizen,

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- (e) a person who under the British Nationality Act 1981 was a British subject,
 - (f) a British protected person within the meaning of that Act, (g) an individual ordinarily resident in the United Kingdom,
 - (h) a body incorporated under the law of any part of the United Kingdom, (i) a Scottish partnership.
- (5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.
 - (6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.
 - (7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.
 - (8) Such proceedings may be taken—
 - (a) in any sheriff court district in which the person is apprehended or in custody, or
 - (b) in such sheriff court district as the Lord Advocate may determine.
 - (9) In subsection (8) “sheriff court district” is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

13 Defence for certain bribery offences etc.

- (1) It is a defence for a person charged with a relevant bribery offence to prove that the person’s conduct was necessary for—
 - (a) the proper exercise of any function of an intelligence service, or
 - (b) the proper exercise of any function of the armed forces when engaged on active service.
- (2) The head of each intelligence service must ensure that the service has in place arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(a).
- (3) The Defence Council must ensure that the armed forces have in place arrangements designed to ensure that any conduct of—
 - (a) a member of the armed forces who is engaged on active service, or
 - (b) a civilian subject to service discipline when working in support of any person falling within paragraph (a),
 which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(b).
- (4) The arrangements which are in place by virtue of subsection (2) or (3) must be arrangements which the Secretary of State considers to be satisfactory.
- (5) For the purposes of this section, the circumstances in which a person’s conduct is necessary for a purpose falling within subsection (1)(a) or (b) are to be treated as including any circumstances in which the person’s conduct—
 - (a) would otherwise be an offence under section 2, and
 - (b) involves conduct by another person which, but for subsection (1)(a) or (b), would be an offence under section 1.
- (6) In this section—

“active service” means service in—

 - (a) an action or operation against an enemy,

- (b) an operation outside the British Islands for the protection of life or property, or
 - (c) the military occupation of a foreign country or territory,
- “armed forces” means Her Majesty’s forces (within the meaning of the Armed Forces Act 2006),
- “civilian subject to service discipline” and “enemy” have the same meaning as in the Act of 2006,
- “GCHQ” has the meaning given by section 3(3) of the Intelligence Services Act 1994,
- “head” means—
- (a) in relation to the Security Service, the Director General of the Security Service,
 - (b) in relation to the Secret Intelligence Service, the Chief of the Secret Intelligence Service, and
 - (c) in relation to GCHQ, the Director of GCHQ,
- “intelligence service” means the Security Service, the Secret Intelligence Service or GCHQ,
- “relevant bribery offence” means—
- (a) an offence under section 1 which would not also be an offence under section 6,
 - (b) an offence under section 2,
 - (c) an offence committed by aiding, abetting, counselling or procuring the commission of an offence falling within paragraph (a) or (b),
 - (d) an offence of attempting or conspiring to commit, or of inciting the commission of, an offence falling within paragraph (a) or (b), or
 - (e) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b).

14 Offences under sections 1, 2 and 6 by bodies corporate etc.

- (1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.
- (2) If the offence is proved to have been committed with the consent or connivance of—
 - (a) a senior officer of the body corporate or Scottish partnership, or
 - (b) a person purporting to act in such a capacity,
 the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.
- (3) But subsection (2) does not apply, in the case of an offence which is committed under section 1, 2 or 6 by virtue of section 12(2) to (4), to a senior officer or person purporting to act in such a capacity unless the senior officer or person has a close connection with the United Kingdom (within the meaning given by section 12(4)).
- (4) In this section—
 - “director”, in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate,
 - “senior officer” means—
 - (a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, and
 - (b) in relation to a Scottish partnership, a partner in the partnership.

15 Offences under section 7 by partnerships

- (1) Proceedings for an offence under section 7 alleged to have been committed by a partnership

must be brought in the name of the partnership (and not in that of any of the partners).

- (2) For the purposes of such proceedings—
- (a) rules of court relating to the service of documents have effect as if the partnership were a body corporate, and
 - (b) the following provisions apply as they apply in relation to a body corporate—
 - (i) section 33 of the Criminal Justice Act 1925 and Schedule 3 to the Magistrates' Courts Act 1980,
 - (ii) section 18 of the Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.)) and Schedule 4 to the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I.26)),
 - (iii) section 70 of the Criminal Procedure (Scotland) Act 1995.
- (3) A fine imposed on the partnership on its conviction for an offence under section 7 is to be paid out of the partnership assets.
- (4) In this section "partnership" has the same meaning as in section 7.

Supplementary and final provisions

16 Application to Crown

This Act applies to individuals in the public service of the Crown as it applies to other individuals.

17 Consequential provision

- (1) The following common law offences are abolished—
- (a) the offences under the law of England and Wales and Northern Ireland of bribery and embracery,
 - (b) the offences under the law of Scotland of bribery and accepting a bribe. (2) Schedule 1 (which contains consequential amendments) has effect.
- (3) Schedule 2 (which contains repeals and revocations) has effect.
- (4) The relevant national authority may by order make such supplementary, incidental or consequential provision as the relevant national authority considers appropriate for the purposes of this Act or in consequence of this Act.
- (5) The power to make an order under this section—
- (a) is exercisable by statutory instrument,
 - (b) includes power to make transitional, transitory or saving provision,
 - (c) may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment (including any Act passed in the same Session as this Act).
- (6) Subject to subsection (7), a statutory instrument containing an order of the Secretary of State under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (7) A statutory instrument containing an order of the Secretary of State under this section which does not amend or repeal a provision of a public general Act or of devolved legislation is subject to annulment in pursuance of a resolution of either House of Parliament.

- (8) Subject to subsection (9), a statutory instrument containing an order of the Scottish Ministers under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.
- (9) A statutory instrument containing an order of the Scottish Ministers under this section which does not amend or repeal a provision of an Act of the Scottish Parliament or of a public general Act is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (10) In this section—
 “devolved legislation” means an Act of the Scottish Parliament, a Measure of the National Assembly for Wales or an Act of the Northern Ireland Assembly,
 “enactment” includes an Act of the Scottish Parliament and Northern Ireland legislation,
 “relevant national authority” means—
 (a) in the case of provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, the Scottish Ministers, and
 (b) in any other case, the Secretary of State.

18 Extent

- (1) Subject as follows, this Act extends to England and Wales, Scotland and Northern Ireland.
- (2) Subject to subsections (3) to (5), any amendment, repeal or revocation made by Schedule 1 or 2 has the same extent as the provision amended, repealed or revoked.
- (3) The amendment of, and repeals in, the Armed Forces Act 2006 do not extend to the Channel Islands.
- (4) The amendments of the International Criminal Court Act 2001 extend to England and Wales and Northern Ireland only.
- (5) Subsection (2) does not apply to the repeal in the Civil Aviation Act 1982.

19 Commencement and transitional provision etc.

- (1) Subject to subsection (2), this Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.
- (2) Sections 16, 17(4) to (10) and 18, this section (other than subsections (5) to (7)) and section 20 come into force on the day on which this Act is passed.
- (3) An order under subsection (1) may—
 (a) appoint different days for different purposes,
 (b) make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act.
- (4) The Secretary of State must consult the Scottish Ministers before making an order under this section in connection with any provision of this Act which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament.
- (5) This Act does not affect any liability, investigation, legal proceeding or penalty for or in respect of—
 (a) a common law offence mentioned in subsection (1) of section 17 which is committed wholly or partly before the coming into force of that subsection in relation to such an offence, or

- (b) an offence under the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906 committed wholly or partly before the coming into force of the repeal of the Act by Schedule 2 to this Act.
- (6) For the purposes of subsection (5) an offence is partly committed before a particular time if any act or omission which forms part of the offence takes place before that time.
- (7) Subsections (5) and (6) are without prejudice to section 16 of the Interpretation Act 1978 (general savings on repeal).

20 Short title

This Act may be cited as the Bribery Act 2010.

SCHEDULES

SCHEDULE 1 Section 17(2)

CONSEQUENTIAL AMENDMENTS

Ministry of Defence Police Act 1987 (c. 4)

- 1 In section 2(3)(ba) of the Ministry of Defence Police Act 1987 (jurisdiction of members of Ministry of Defence Police Force) for “Prevention of Corruption Acts 1889 to 1916” substitute “Bribery Act 2010”.

Criminal Justice Act 1987 (c. 38)

- 2 In section 2A of the Criminal Justice Act 1987 (Director of SFO’s pre- investigation powers in relation to bribery and corruption: foreign officers etc.) for subsections (5) and (6) substitute—
- “(5) This section applies to any conduct—
- (a) which, as a result of section 3(6) of the Bribery Act 2010, constitutes an offence under section 1 or 2 of that Act under the law of England and Wales or Northern Ireland, or
 - (b) which constitutes an offence under section 6 of that Act under the law of England and Wales or Northern Ireland.”

International Criminal Court Act 2001 (c. 17)

- 3 The International Criminal Court Act 2001 is amended as follows.
- 4 In section 54(3) (offences in relation to the ICC: England and Wales)—
- (a) in paragraph (b) for “or” substitute “, an offence under the Bribery Act 2010 or (as the case may be) an offence”, and
 - (b) in paragraph (c) after “common law” insert “or (as the case may be) under the Bribery Act 2010”.
- 5 In section 61(3)(b) (offences in relation to the ICC: Northern Ireland) after “common law” insert “or (as the case may be) under the Bribery Act 2010”.

International Criminal Court (Scotland) Act 2001 (asp 13)

- 6 In section 4(2) of the International Criminal Court (Scotland) Act 2001 (offences in relation to the ICC)—
- (a) in paragraph (b) after “common law” insert “or (as the case may be) under the Bribery Act 2010”, and
 - (b) in paragraph (c) for “section 1 of the Prevention of Corruption Act 1906 (c.34) or at common law” substitute “the Bribery Act 2010”.

 Serious Organised Crime and Police Act 2005 (c. 15)

- 7 The Serious Organised Crime and Police Act 2005 is amended as follows.
- 8 In section 61(1) (offences in respect of which investigatory powers apply) for paragraph (h) substitute—
- “(h) any offence under the Bribery Act 2010.”
- 9 In section 76(3) (financial reporting orders: making) for paragraphs (d) to (f) substitute—
- “(da) an offence under any of the following provisions of the Bribery Act 2010—
- section 1 (offences of bribing another person), section 2 (offences relating to being bribed), section 6 (bribery of foreign public officials);”.
- 10 In section 77(3) (financial reporting orders: making in Scotland) after paragraph (b) insert—
- “(c) an offence under section 1, 2 or 6 of the Bribery Act 2010.”

Armed Forces Act 2006 (c. 52)

- 11 In Schedule 2 to the Armed Forces Act 2006 (which lists serious offences the possible commission of which, if suspected, must be referred to a service police force), in paragraph 12, at the end insert —
- “(aw) an offence under section 1, 2 or 6 of the Bribery Act 2010.”

Serious Crime Act 2007 (c. 27)

- 12 The Serious Crime Act 2007 is amended as follows.
- 13 (1) Section 53 of that Act (certain extra-territorial offences to be prosecuted only by, or with the consent of, the Attorney General or the Advocate General for Northern Ireland) is amended as follows.
- (2) The existing words in that section become the first subsection of the section. (3) After that subsection insert—
- “(2) Subsection (1) does not apply to an offence under this Part to which section 10 of the Bribery Act 2010 applies by virtue of section 54(1) and (2) below (encouraging or assisting bribery).”
- 14 (1) Schedule 1 to that Act (list of serious offences) is amended as follows.
- (2) For paragraph 9 and the heading before it (corruption and bribery: England and Wales) substitute— “Bribery
- 9 An offence under any of the following provisions of the Bribery Act 2010—
- (a) section 1 (offences of bribing another person);
- (b) section 2 (offences relating to being bribed);
- (c) section 6 (bribery of foreign public officials).”
- (3) For paragraph 25 and the heading before it (corruption and bribery: Northern Ireland) substitute — “Bribery
- 25 An offence under any of the following provisions of the Bribery Act 2010—
- (a) section 1 (offences of bribing another person);
- (b) section 2 (offences relating to being bribed);
- (c) section 6 (bribery of foreign public officials).”

THE BRIBERY ACT, 2010.

**GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COM-
MERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT
PERSONS ASSOCIATED WITH THEM FROM BRIBING
(SECTION 9 OF THE BRIBERY ACT 2010)**

FOREWORD

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade. That is why the entry into force of the Bribery Act on 1 July 2011 is an important step forward for both the UK and UK plc. In line with the Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

Readers of this document will be aware that the Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

I have listened carefully to business representatives to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance. I encourage small businesses to turn to this for a concise introduction to how they can meet the requirements of the law.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading

role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards. It also establishes a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish.

Everyone agrees bribery is wrong and that rules need reform. In implementing this Act, we are striking a blow for the rule of law and growth of trade. I commend this guidance to you as a helping hand in doing business competitively and fairly.



Kenneth Clarke
Secretary of State for Justice
March 2011

INTRODUCTION

1. The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1 The Act creates a new offence under section 7 which can be committed by commercial organisations¹ which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.

2 The Act extends to England & Wales, Scotland and Northern Ireland. This guidance is for use in all parts of the United Kingdom. In accordance with section 9(3) of the Act, the Scottish Ministers have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted.

3 This guidance explains the policy behind section 7 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1).

4 The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

5 If your organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery.

A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.

7 The language used in this guidance reflects its non-prescriptive nature.

The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language. The commentary following each of the principles is expressed more broadly.

8 All terms used in this guidance have the same meaning as in the Bribery Act 2010. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.

GOVERNMENT POLICY AND SECTION 7 OF THE BRIBERY ACT

9. Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2010 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts (raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment) and wide jurisdictional powers (see paragraphs 15 and 16 on page 9).

10 The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business², and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 1, 6 and 7 offences is provided under the separate headings below.

11 The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

12 The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities – for example to the Serious Fraud

Office (SFO) which operates a policy in England and Wales and Northern Ireland of co-operation with commercial organisations that self-refer incidents of bribery (see ‘Approach of the SFO to dealing with overseas corruption’ on the SFO website). The commercial organisation’s willingness to co-operate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

13 In order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence. Where the prosecution cannot prove beyond reasonable doubt that a sections 1 or 6 offence has been committed the section 7 offence will not be triggered.

14 The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law ‘identification’ principle.

JURISDICTION

15 Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 24 or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

16 However, as regards section 7, the requirement of a close connection with the UK does not apply. Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in

the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere. So, provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction (see more on this at paragraphs 34 to 36).

SECTION 1: OFFENCES OF BRIBING ANOTHER PERSON

17 Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in one of two cases:

- Case 1 applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.
- Case 2 applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

18 'Improper performance' is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.

19 For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to UK law (for example, it takes place in a country outside UK jurisdiction) then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.

20 By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in

accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

SECTION 6: BRIBERY OF A FOREIGN PUBLIC OFFICIAL

21 Section 6 creates a standalone offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.

22 A 'foreign public official' includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN or the World Bank.

23 Sections 1 and 6 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 6 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to 'improper performance' of a relevant function or activity to which section 1 applies, but, unlike section 1, section 6 does not require proof of it or an intention to induce it. This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 1 would

amount to a very significant deficiency in the ability of the legislation to address this particular mischief. That said, it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 7, the Government offers the following further explanation of issues arising from the formulation of section 6.

LOCAL LAW

24 For the purposes of section 6 prosecutors will be required to show not only that an 'advantage' was offered, promised or given to the official or to another person at the official's request, assent or acquiescence, but that the advantage was one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.

25 In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other 'advantage' to a public official or to another person at the official's request, assent or acquiescence. Where, however, relevant 'written law' permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence. So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor's offer of free training is very unlikely to engage section 6. In circumstances where the additional investment would amount to an advantage to a foreign public official and the local law is silent as to whether the official is permitted or required to be influenced

by it, prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise.

HOSPITALITY, PROMOTIONAL, AND OTHER BUSINESS EXPENDITURE

26 Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.

27 In order to amount to a bribe under section 6 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to 'a financial or other advantage' to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.

28 Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where the prosecution cannot prove this to the requisite standard then no offence under section 6 will be committed. There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level

of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business. In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.

29 The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.

30 Levels of expenditure will not, therefore, be the only consideration in determining whether a section 6 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.

31 Some further examples might be helpful. The provision by a UK mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems are circumstances that fall outside the intended scope of the offence. Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves, unlikely to raise the necessary inferences. However, if the choice of New York as the most convenient venue was in doubt because the organisation's senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week

then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation's background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 6. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation's services is, all things being equal, far more likely to raise the necessary inference.

32 It may be that, as a result of the introduction of the section 7 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure.

SECTION 7: FAILURE OF COMMERCIAL ORGANISATIONS TO PREVENT BRIBERY

33 A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

COMMERCIAL ORGANISATION

34 Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase.

35 As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely

public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

36 As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the United Kingdom satisfies the test in the Act, the final arbiter, in any particular case, will be the courts as set out above. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

ASSOCIATED PERSON

37 A commercial organisation is liable under section 7 if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 8 as a person who 'performs services' for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf

of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

38 This broad scope means that contractors could be 'associated' persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person.

39 Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

40 As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence

of a joint venture entity will not of itself mean that it is 'associated' with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.

41 The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the 'relevant circumstances' that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was 'performing services for or on behalf of' a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person 'associated' with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.

42 Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same

token, liability for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

43 The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation. The scope of the definition at section 8 needs to be appreciated within this context. This point is developed in more detail under the six principles set out on pages 20 to 31.

FACILITATION PAYMENTS

44 Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.

45 As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development⁵ recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.

46 The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business

representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.

47 Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.

DURESS

48 It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

PROSECUTORIAL DISCRETION

49 Whether to prosecute an offence under the Act is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.

50 In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act.

51 Factors that weigh for and against the public interest in prosecuting in England and Wales are referred to in the joint guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions referred to at paragraph 47.

THE SIX PRINCIPLES

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focused, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is provided at Appendix A. These are designed to illustrate the application of the principles for small, medium and large organisations.

PRINCIPLE 1. PROPORTIONATE PROCEDURES

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Commentary

1.1 The term 'procedures' is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation's anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.

1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.

1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

1.4 Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation's stated anti-bribery policy objectives across all of the organisation's functions.

1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach

and with due allowance for what is practicable and the level of control over existing arrangements.

Procedures

1.6 Commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:

- its commitment to bribery prevention (see Principle 2)
- its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
- an overview of its strategy to implement its bribery prevention policies.

1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organisation's top-level management (see Principle 2).
- Risk assessment procedures (see Principle 3).
- Due diligence of existing or prospective associated persons (see Principle 4).
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
- Direct and indirect employment, including

recruitment, terms and conditions, disciplinary action and remuneration.

- Governance of business relationships with all other associated persons including pre and post contractual agreements.
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
- The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
- The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
- The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

PRINCIPLE 2. TOP-LEVEL COMMITMENT

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

2.1 Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Procedures

2.2 Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery

2.3 This could take a variety of forms.

A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery

- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
- reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector.

Top-level involvement in bribery prevention

2.4 Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation's size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and

procedures to employees, subsidiaries, and associated persons, etc.

- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- Specific involvement in high profile and critical decision making where appropriate.
- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

PRINCIPLE 3. RISK ASSESSMENT

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

3.1 For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.

3.2 Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Procedures

3.3 Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size,

activities, customers or markets, usually reflect a few basic characteristics. These are:

- Oversight of the risk assessment by top level management.
- Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
- Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
- Due diligence enquiries (see Principle 4).
- Accurate and appropriate documentation of the risk assessment and its conclusions.

3.4 As a commercial organisation's business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation's domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered risks

3.5 Commonly encountered external risks can be categorised into five broad groups

– country, sectoral, transaction, business opportunity and business partnership:

- Country risk: this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
- Sectoral risk: some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
- Transaction risk: certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
- Business opportunity risk: such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
- Business partnership risk: certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign

public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

3.6 An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:

- deficiencies in employee training, skills and knowledge
- bonus culture that rewards excessive risk taking
- lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.

PRINCIPLE 4. DUE DILIGENCE

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

4.1 Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.

4.2 The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

Procedures

4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person 'associated' with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section 'Government Policy and section 7', the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business

in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

4.4 Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

4.5 'Due diligence' for the purposes of Principle 4 should be conducted using a risk-based approach (as referred to on page 27). For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged 'associated' persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

4.6 A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

PRINCIPLE 5. COMMUNICATION (INCLUDING TRAINING)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

5.1 Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.

Procedures Communication

5.2 The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.

5.3 Internal communications should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees.

Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called 'speak up' procedures can amount to a very helpful

management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

5.4 External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation's behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

Training

5.5 Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

5.6 General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.

5.7 It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.

5.8 Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning

and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

PRINCIPLE 6. MONITORING AND REVIEW

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

6.1 The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Procedures

6.2 There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.

6.3 Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

6.4 In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation's bribery prevention procedures are 'adequate' for all purposes where an offence under section 7 of the Bribery Act could be charged.

APPENDIX A. BRIBERY ACT 2010 CASE STUDIES

INTRODUCTION

These case studies (which do not form part of the guidance issued under section 9 of the Act) look at how the application of the six principles might relate to a number of hypothetical scenarios commercial organisations may encounter. The Government believes that this illustrative context can assist commercial organisations in deciding what procedures to prevent persons associated with them from bribing on their behalf might be most suitable to their needs.

These case studies are illustrative. They are intended to complement the guidance. They do not replace or supersede any of the principles. The considerations set out below merely show in some circumstances how the principles can be applied, and should not be seen as standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organisations whatever their size. Accordingly, the considerations set out below are not:

- comprehensive of all considerations in all circumstances
- conclusive of adequate procedures
- conclusive of inadequate procedures if not all of the considerations are considered and/or applied.

All but one of these case studies focus on bribery risks associated with foreign markets. This is because bribery risks associated with foreign markets are generally higher than those associated with domestic markets. Accordingly case studies focussing on foreign markets are better suited as vehicles for the illustration of bribery prevention procedures.

CASE STUDY 1 – PRINCIPLE 1. FACILITATION PAYMENTS

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of non-payment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2010.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate:
 - questioning of legitimacy of demands
 - requesting receipts and identification details of the official making the demand
 - requests to consult with superior officials
 - trying to avoid paying 'inspection fees' (if

not properly due) in cash and directly to an official

- informing those demanding payments that compliance with the demand

may mean that A (and possibly C) will commit an offence under UK law

- informing those demanding payments that it will be necessary for C to inform the UK embassy of the demand.
- Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.
- Use of any UK diplomatic channels or participation in locally active non- governmental organisations, so as to apply pressure on the authorities of B to take action to stop demands for facilitation payments.

CASE STUDY 2 – PRINCIPLE 1. PROPORTIONATE PROCEDURES

A small to medium sized installation company is operating entirely within the United Kingdom domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf.

In seeking to mitigate these risks the company could consider any or a combination of the following: searches and following up any business references and financial statements.

- Considering firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.

- Consider making consultants' contracts subject to periodic review and renewal.

- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants

- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.

- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.

- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.

- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet

CASE STUDY 3 – PRINCIPLES 1 AND 6. JOINT VENTURE

A medium sized company ('D') is interested in significant foreign mineral deposits. D proposes to enter into a joint venture with a local mining company ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery.

D could consider negotiating for the inclusion of any or a combination of the following bribery prevention procedures into the agreement setting up DE:

- Parity of representation on the board of

DE.

• That DE put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures might cover such issues as:

- gifts and hospitality
- agreed decision making rules
- procurement
- engagement of third parties, including due diligence requirements
- conduct of relations with public officials
- training for staff in high risk positions
- record keeping and accounting.

• The establishment of an audit committee with at least one representative of each of D and E that has the power to view accounts and certain expenditure and prepare regular reports.

• Binding commitments by D and E to comply with all applicable bribery laws in relation to the operation of DE, with a breach by either D or E being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

CASE STUDY 4 – PRINCIPLES 1 AND 5. HOSPITALITY AND PROMOTIONAL EXPENDITURE

A firm of engineers ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the

following:

• Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.

• Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.

• The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:

• that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F

• that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials

• that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations

• that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected

• criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances

• that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for

• for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration

• accounting (book-keeping, orders, invoices, delivery notes, etc).

- Regular monitoring, review and evaluation of internal procedures and compliance with them.
- Appropriate training and supervision provided to staff.

CASE STUDY 5 – PRINCIPLE 3. ASSESSING RISKS

A small specialist manufacturer is seeking to expand its business in one of several emerging markets, all of which offer comparable opportunities. It has no specialist risk assessment expertise and is unsure how to go about assessing the risks of entering a new market.

The small manufacturer could consider any or a combination of the following:

- Incorporating an assessment of bribery risk into research to identify the optimum market for expansion.
- Seeking advice from UK diplomatic services and government organisations such as UK Trade and Investment.
- Consulting general country assessments undertaken by local chambers of commerce, relevant non-governmental organisations and sectoral organisations.
- Seeking advice from industry representatives.
- Following up any general or specialist advice with further independent research.

CASE STUDY 6 – PRINCIPLE 4. DUE DILIGENCE OF AGENTS

A medium to large sized manufacturer of specialist equipment ('G') has an opportunity to enter an emerging market in a foreign country ('H') by way of a government contract to supply equipment to the state. Local convention requires any foreign commercial organisations to operate through a local agent. G is concerned to appoint a reputable agent and ensure that the risk of bribery being used to develop its business in the market is minimised.

G could consider any or a combination of the following:

- Compiling a suitable questionnaire for

potential agents requiring for example, details of ownership if not an individual; CVs and references for those involved in performing the proposed service; details of any directorships held, existing partnerships and third party relationships and any relevant judicial or regulatory findings.

- Having a clear statement of the precise nature of the services offered, costs, commissions, fees and the preferred means of remuneration.
- Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- Making enquiries with the relevant authorities in H to verify the information received in response to the questionnaire.
- Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.
- Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- Being alert to key commercial questions such as:
 - Is the agent really required?
 - Does the agent have the required expertise?
 - Are they interacting with or closely connected to public officials?
 - Is what you are proposing to pay reasonable and commercial?
- Renewing due diligence enquiries on a periodic basis if an agent is appointed.

CASE STUDY 7 – PRINCIPLE 5. COMMUNICATING AND TRAINING

A small UK manufacturer of specialist equipment ('J') has engaged an individual as a local agent and adviser ('K') to assist with winning a contract and developing its business in a foreign country where the risk of bribery is assessed as high.

J could consider any or a combination of the following:

- Making employees of J engaged in bidding for business fully aware of J's anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in its tender.
- Including suitable contractual terms on bribery prevention measures in the agreement between J and K, for example: requiring K not to offer or pay bribes; giving J the ability to audit K's activities and expenditure; requiring K to report any requests for bribes by officials to J; and, in the event of suspicion arising as to K's activities, giving J the right to terminate the arrangement.
- Making employees of J fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct.
- Supplementing the information, where appropriate, with specially prepared training to J's staff involved with the foreign country.

CASE STUDY 8 – PRINCIPLE 1, 4 AND 6. COMMUNITY BENEFITS AND CHARITABLE DONATIONS

A company ('L') exports a range of seed products to growers around the globe. Its representative travels to a foreign country ('M') to discuss with a local farming co-operative the possible supply of a new strain of wheat that is resistant to a disease which recently swept the region. In the meeting, the head of the co-operative tells L's representative about the problems which the relative unavailability of antiretroviral drugs cause locally in the face of a high HIV infection rate.

In a subsequent meeting with an official of M to discuss the approval of L's new wheat strain for import, the official suggests that L could pay for the necessary antiretroviral drugs and that this will be a very positive factor in the Government's consideration of the licence to import the new seed strain. In a further meeting, the same official states that L should donate money to a certain charity suggested by the official which, the official assures, will then take the necessary steps to purchase and distribute the drugs. L identifies this as raising potential bribery risks.

L could consider any or a combination of the following:

- Making reasonable efforts to conduct due diligence, including consultation with staff members and any business partners it has in country M in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product. It could do this by obtaining information on:
 - M's local law on community benefits as part of Government procurement and, if no particular local law, the official status and legitimacy of the suggested arrangement
 - the particular charity in question including its legal status, its reputation in M, and whether it has conducted similar projects, and
 - any connections the charity might have with the foreign official in question, if possible.
 - Adopting an internal communication plan designed to ensure that any relationships

with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence.

- Adopting company-wide policies and procedures about the selection of charitable projects or initiatives which are informed by appropriate risk assessments.
- Training and support for staff in implementing the relevant policies and procedures of communication which allow issues to be reported and compliance to be monitored.
- If charitable donations made in country M are routinely channelled through government officials or to others at the official's request, a red flag should be raised and L may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official 'off-set' or 'community gain' arrangements with the government of M.
- Evaluation of its policies relating to charitable donations as part of its next periodic review of its anti-bribery procedures.

CASE STUDY 9 – PRINCIPLE 4. DUE DILIGENCE OF AGENTS

A small UK company ('N') relies on agents in country ('P') from which it imports local high quality perishable produce and to which it exports finished goods. The bribery risks it faces arise entirely as a result of its reliance on agents and their relationship with local businessmen and officials. N is offered a new business opportunity in P through a new agent ('Q'). An agreement with Q needs to be concluded quickly.

N could consider any or a combination of the following:

- Conducting due diligence and background checks on Q that are proportionate to

the risk before engaging Q; which could include:

- making enquiries through N's business contacts, local chambers of commerce or business associations, or internet searches
- seeking business references and a financial statement from Q and reviewing Q's CV to ensure Q has suitable experience.
- Considering how best to structure the relationship with Q, including how Q should be remunerated for its services and how to seek to ensure Q's compliance with relevant laws and codes applying to foreign public officials.
- Making the contract with Q renewable annually or periodically.
- Travelling to P periodically to review the agency situation.

CASE STUDY 10 – PRINCIPLE 2. TOP LEVEL COMMITMENT

A small to medium sized component manufacturer is seeking contracts in markets abroad where there is a risk of bribery. As part of its preparation, a senior manager has devoted some time to participation in the development of a sector wide anti-bribery initiative.

The top level management of the manufacturer could consider any or a combination of the following:

- The making of a clear statement disseminated to its staff and key business partners of its commitment to carry

out business fairly, honestly and openly, referencing its key bribery prevention procedures and its involvement in the sectoral initiative.

- Establishing a code of conduct that includes suitable anti-bribery provisions and making it accessible to staff and third parties on its website.

- Considering an internal launch of a code of conduct, with a message of commitment to it from senior management.

- Senior management emphasising among the workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching the policy or contractual provisions relating to bribery prevention for employees and managers and external associated persons.

- Identifying someone of a suitable level of seniority to be a point-person for queries and issues relating to bribery risks.

CASE STUDY 11. PROPORTIONATE PROCEDURES

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk based bribery prevention procedures.

The company could consider any or a combination of the following:

Using trade fairs and trade publications to communicate periodically its anti-bribery message and, where appropriate, some detail of its policies and procedures.

- Oral or written communication of its bribery prevention intentions to all of its agents.

- Adopting measures designed to address bribery on its behalf by associated persons, such as:

- requesting relevant information and conducting background searches

on the internet against information received

- making sure references are in order and followed up

- including anti-bribery commitments in any contract renewal

- using existing internal arrangements such as periodic staff meetings to raise awareness of 'red flags' as regards agents' conduct, for example evasive answers to straightforward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.

- Making use of any external sources of information (UKTI, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.

- Making sure staff have a confidential means to raise any concerns about bribery.



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