# The City of London Law Society

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## CITY OF LONDON LAW SOCIETY

**Response to the Ministry of Justice consultation on guidance about commercial organisations preventing bribery (section 9 of the *Bribery Act 2010*)**

The City of London Law Society ("**CLLS**") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees and in this case the response has been prepared by a working party of the CLLS Company Law and Commercial Law Committees.

The Ministry of Justice ("**MoJ**") consultation dated 14 September 2010 asked for views on its draft guidance produced pursuant to section 9 of the *Bribery Act 2010* ("**the Act**"). We respond below. In responding, we have addressed the five questions posed by the MoJ. We have also included some further general comment on the form and content of the draft guidance.

### VIEWS ON THE DRAFT GUIDANCE

1. ***QUESTION 1:*** *Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?*

1.1 In our view the Six Principles for Bribery Prevention set out in the draft statutory guidance are appropriate and are helpful - insofar as they go (see further our general comment at paragraph 6.2 below).

However, we suggest that a seventh principle of "Proportionality" be included in the guidance. Whilst it may be said that proportionality is implicit in Principle 1 (Risk Assessment), we believe it would benefit readers of the guidance to state this principle explicitly. This would allow all commercial organisations, but especially small and medium-sized enterprises ("**SMEs**"), to know that the question of whether they are likely to have satisfied the statutory defence will be considered in the light (among other things) of the size and structure of their organisation and the nature of the risks to which it is exposed.[1]

Not only will different organisations and industry sectors be subject to very different bribery risks (in terms of both quantity and degree), but they will also have access to very different levels of financial and human resource to devise and implement the procedures that can reasonably be expected of them in order to prevent corruption, particularly where it involves markets in far-flung countries.

[1] This is not to say that large organisations are more exposed to bribery risks, and must therefore have stricter controls in place, simply because they are large. Rather, the pertinent issue is for each relevant organisation to consider and then address through the imposition of controls that are appropriate the industry sector(s) and geographical location(s) in which the organisation operates.

1.2 Accordingly, the principle of "Proportionality" would operate so as to allow any organisation to assert in its defence that, even where bribery risks have been identified (in the context of a particular organisation's risk assessment), the organisation could not have been expected to expend disproportionate effort or resource, or to have disproportionately onerous procedures in place, in order to eliminate those risks. We believe that such an approach is consistent with the principles enunciated by Lord Bach[2] in relevant parliamentary debates and correspondence.

1.3 The statutory language of section 7(2) uses the word "designed", and this will presumably be given its natural meaning. Accordingly, we think that it would also be helpful for the guidance to make it clear that the procedures that are required, and ultimately judged as to whether they are adequate, are those that are ***designed*** (that is to say, intended) to prevent bribery, with the result that a defence under section 7 (2) will not fail solely because the procedures did not in the event prevent bribery from occurring. Put another way, the mere fact that an offence has occurred under sections 1 or 6 of the Act by a person associated with the organisation should not of itself give rise to any presumption that the procedures which the organisation had in place in order to prevent bribery were not adequate. We believe the guidance would benefit from the inclusion of clarification along these lines.

2. ***QUESTION 2:*** *Are there any procedures other than those set out in the draft guidance that are relevant to a wide range of commercial organisations? If so what are they and why do you think they are important?*

2.1 One of our key concerns with the approach adopted in the draft guidelines is that they fail to provide any guidance on procedures as such, and instead confine themselves to giving high level discussion over principles. Whilst this may reflect the intention and policy of the Government (as is explained in the introductory section of the Consultation paper and in Annex A), it does not (in our view) fully discharge the Secretary of State's obligation to provide the procedural guidance required by section 9 of the Act; nor does it appear to achieve what Parliament intended when section 9 was introduced, on amendment, into the draft legislation. See further what is said at paragraph 6.2 below.

2.2 See also our response to Question 3.

3. ***QUESTION 3:*** *Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?*

3.1 We have three comments to make in response to this question.

3.2 The first is that consideration should be given to whether the MoJ can assist commercial organisations by setting out certain categories of "minimum" procedures that all organisations, regardless of size, ought to have in place.

3.3 The second is that the guidance regarding Principle 3 (Due Diligence) should be expanded so as to make it clear that "adequate procedures" does not require an organisation to conduct anti-corruption due diligence in respect of its entire supply chain.

3.4 The third is that the guidance regarding Principle 4 (Clear, Practical and Accessible Policies and Procedures) should provide more detail (with examples) as to how a commercial organisation should determine what constitutes a person or entity over which it has "control", as well as guidance on whether commercial organisations will

[2] Former Parliamentary Under Secretary of State.

be expected to report incidents of bribery it uncovers in relation to other commercial organisations or individuals.

3.5 **"Minimum" procedures**

3.5.1 For the avoidance of doubt, we do not propose that any notion of "minimum" procedures ought to supplant "adequate" procedures as the standard by which the section 7(2) defence is to be judged. In other words, organisations which are able to demonstrate that they have "minimum" procedures in place to prevent bribery would still need to demonstrate that those procedures are "adequate" - in light of their particular risk profile - in order to make out the defence.

3.5.2 However, we do think it would be appropriate and helpful for the MoJ to articulate those categories of procedures which every organisation, regardless of size, ought to have in place. By including specific categories of procedures the guidance would provide organisations with: (i) a level foundation upon which to build further procedures, if necessary; and (ii) much needed certainty as to what is required of commercial organisations, which is important given that the Act is criminal legislation and the section 7 offence is one of strict liability. Also, the inclusion of guidance as to the minimum procedures required will reduce the burden on SMEs which are less able to afford the professional advice needed on how to apply the principles.

3.5.3 Any suggested categories of procedures would, of course, need to be those that even the smallest organisations would reasonably be able to put in place. We suggest the following categories of minimum procedures would be appropriate:

- A documented risk assessment exercise;
- A written procedure governing the appointment of third parties who are to perform services for or on behalf of the commercial organisation in, or in relation to, overseas countries (perhaps distinguishing between those in different countries, according to the perceived prevalence of bribery);
- An employee training programme and inclusion of anti-corruption compliance in relevant[3] employees' performance review criteria;
- Clear, accessible, written procedures for the escalation of concerns to appropriate levels within the organisation and prescribing how (and by whom) potential incidents are to be investigated; and
- An annual review of the procedures and the results of such review by the board of directors or other appropriate governing body.

Whilst already implicit in the draft guidance, it would be helpful if the guidance explicitly allowed all organisations to take a risk-based approach and stated that the aim of such an approach is appropriate risk mitigation, rather than total risk elimination (as noted in our comments at paragraph 1.3 above).

3.5.4 Once again we make the point that section 9 requires the Secretary of State to publish guidance about procedures that commercial organisations can put in place to prevent associated persons from committing the offence of

[3] The guidance could provide organisations with discretion in determining which employees, if any, are "relevant" in this context, but should state that this issue must be determined in the context of the documented risk assessment exercise.

bribery; we respectfully submit that in our view guidance confined to high level principles does not fully discharge the Secretary of State's statutory obligation.

3.6 **Suggested revision to Principle 3 (Due Diligence)**

3.6.1 Our second comment in response to Question 3 is that the guidance regarding Principle 3 (Due Diligence) should be expanded so as to make it clear that "adequate procedures" does not always require an organisation to conduct anti-corruption due diligence in respect of its entire supply chain.

3.6.2 By way of explanation: section 8 of the Act defines "associated person" as "*a person who performs services for or on behalf of*" the organisation (emphasis added). In addition, the section 7 offence itself requires that the underlying bribe must have been made with the intent (on the part of the "associated person") to either (a) obtain or retain business for the commercial organisation; or (b) obtain or retain an advantage in the conduct of business for the commercial organisation.[4]

3.6.3 In our view, it is often the case that suppliers and other parts of an organisation's supply chain do not perform services "for or on behalf of" the organisation in a manner that engages the section 7 offence. There is a real distinction to be drawn between, on the one hand, third parties who are acting as an organisation's sales/marketing agents (and thus representing the organisation and seeking to "*obtain or retain business or an advantage in the conduct of business*" for it) and, on the other hand, third parties who are simply supplying the organisation with goods or services but who do not represent it nor, strictly speaking, have any intent to obtain or retain business (or an advantage in the conduct of business) for it.

3.6.4 Indeed, corruption involving an organisation's suppliers or supply chain is much more likely to flow in the other direction, with suppliers seeking (through advantages or incentives) to influence the relevant commercial organisation to prefer them over a competitor. However, the receipt of a bribe by a commercial organisation is entirely irrelevant to the section 7 offence as it cannot be the trigger for that offence. The section 9 guidance relates only to the section 7 offence, not to the Act as a whole.

3.6.5 Accordingly, the draft guidance's unqualified references to due diligence in respect of "suppliers" and the "supply chain" appear to go beyond what the law actually requires. In doing so, the guidance adds confusion and an additional layer of compliance burden. This is unnecessary and unlikely to have any value in reducing the incidence of bribery by persons performing services "for or on behalf of" commercial organisations. We would also submit that it is unrealistic and onerous to expect large global companies (some of which will have thousands of suppliers and supply chains with innumerable moving, and constantly changing, parts) to conduct anti-corruption due diligence across all the actors in that supply chain.

3.6.6 The supply chain example is illustrative of the difficulty in applying the definition in practice, and it would be helpful if the guidance could give some further assistance on the application of Principle 3 to other business relationships. In any event, consideration should be given to providing further, specific guidance on the types of individuals and entities that are capable of being construed as "associated persons" - and the circumstances in which they will be so construed - so as to remove uncertainty. At the very least this guidance could describe the circumstances in which a subsidiary will/will not be considered to be performing services for or on behalf of its

[4] Sections 7(1)(a) and 7(1)(b) of the Act.

parent company. In our view, it is clear that where a subsidiary is a separate business managed on a stand-along basis, it should not generally be considered to be providing services for and on behalf of the parent simply by virtue of the group relationship. It would be useful for the guidance to articulate the additional factors that would change this analysis so as to render the subsidiary an "associated person" for the purposes of section 8 of the Act.

3.7 **Suggested revision to Principle 4 (Clear, Practical and Accessible Policies and Procedures)**

3.7.1 Principle 4 of the draft guidance requires the anti-bribery policies and procedures of a commercial organisation to take account of the roles of "*all people and entities over which the commercial organisation has control*". It would be helpful if the guidance could again give more detail (with examples) as to how an organisation should determine what constitutes a person or entity over which it has control, with a view to helping an organisation to assess the extent to which it should seek to impose its corruption policies and procedures. What does "control" mean in this context? For example, would an organisation "control" an entity in which it holds only a minority equity or economic interest that carries veto rights (i.e. confers negative control) over key decisions?

3.7.2 There is some commentary in the notes to Principle 4 on management of incidents of bribery. Again, clearer guidance would be useful on whether there is any expectation that a commercial organisation should report incidents of bribery which it uncovers in relation to other commercial organisations or individuals.

4. ***QUESTION 4:*** *Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are important?*

4.1 We have already discussed above our view that the guidance should include a seventh principle of "Proportionality". This principle is of particular relevance and importance to SMEs.

4.2 In addition, we believe that the MoJ should consider providing guidance to SMEs on when it would be permissible for them to rely upon (or at least take into account) a third party's status as an approved agent or service provider to a publicly-listed entity (particularly where that entity is a "household name" in the same industry sector as the SME) so as to minimise the due diligence burden on the SME when appointing that same third party to perform services for or on behalf of it.

4.3 For example, it should be reasonable and adequate for an SME in the defence sector to be able, in appropriate circumstances, to rely upon the fact that a proposed third party agent (i) has satisfied the anti-corruption requirements of a global, publicly-listed defence firm that can be expected to have in place established and rigorous anti-bribery preventative procedures of its own; and (ii) continues to be appointed by that firm, when determining how much of its own pre-appointment due diligence it needs to conduct on the third party.

4.4 We would note that the Joint Money Laundering Steering Group's guidance to the UK financial sector on prevention of money laundering/combating terrorist financing ("**JMLSG Guidance**") includes provisions which could inform the development of similar guidance in the context of anti-corruption compliance. See paragraphs 5.6.4 to 5.6.42 of the JMLSG Guidance.

5. ***QUESTION 5:*** *In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?*

5.1 As noted above, we consider that the introduction of a seventh overriding principle of proportionality will be of specific benefit to SMEs.

5.2 Other more specific guidance targeted at SMEs would also be of value.

For example, SMEs could be given explicit guidance on when they will be expected (if ever) to incur the cost and burden of providing anti-corruption training to overseas third parties. Given their likely resource constraints (particularly in the current economic environment), it would be impractical and disproportionate to expect SMEs to go to such lengths other than in the most acute situations. One possible way to approach this - and in doing so remove all doubt - would be to identify those countries or territories where the risk of corruption is sufficiently high[5] that all companies (including SMEs) must provide anti-corruption training to any third parties they appoint to perform services on their behalf in those countries or territories. Thus, for example, the guidance could state that where a country or territory has a score of 2.0 or less on the most recent edition of the Corruption Perceptions Index, third party training is required, but possibly not otherwise. Such guidance would provide much needed certainty to SMEs and would be proportionate in view of resource constraints affecting SMEs, as well as the weaker bargaining power that SMEs can be expected to command in their trading dealings with third parties when compared with larger, multinational concerns.

5.3 Some similar scoring system could be considered in terms of the specific procedures and measures required in order to comply with Principle 2.

6. **FURTHER COMMENTS**

We offer the following general observations.

6.1 **Scope**

6.1.1 We think it would be helpful if the Ministry of Justice could clarify in the guidance what is meant by "*carries on business, or part of a business in the United Kingdom*" (see section 7(5) of the Act). For example, does this mean that a "relevant commercial organisation" includes foreign companies with no physical presence in the UK but with a listing on, for example, the Official List or on the Alternative Investment Market? What about foreign companies with no physical presence in the UK but who trade through UK agents with authority to contract on their behalf in the UK?

6.2 **Prosecutorial discretion**

6.2.1 It is a basic canon of English jurisprudence that our criminal law must be clear and accessible, and that citizens of the UK must be capable of knowing in advance what behaviour is permitted and what is illegal. The reasons for this are twofold: (i) the power of the State must be effectively limited; and (ii) individuals (as well as commercial organisations) must be given sufficient information to enable them to make rational choices as to their behaviour.

In the context of the new offence created by section 7 of the Act, all commercial organisations subject to the Act are entitled to certainty in

[5] By reference to a single, reputable source such as Transparency International's Corruption Perceptions Index.

circumstances where - in order to avoid a strict liability criminal offence[6] - they will have to demonstrate to a jury that their procedures to prevent bribery are "adequate".[7]

6.2.2 It is widely acknowledged that the offences created by the new Act are widely drawn and as a result of their wide scope the Act outlaws conduct that in many other countries would be permitted and perfectly lawful.

There is tacit recognition of this in the Consultation paper, where it is stated (by way of example) that prosecutorial discretion will be exercised with a "degree of flexibility in order to ensure the just and fair operation of the Act".

6.2.3 It is respectfully submitted that this is an unsatisfactory approach. In order to provide the degree of certainty that is required in relation to our criminal code, and which every commercial organisation is entitled to expect in order to avoid committing an offence under section 7 of the Act, it is to our mind essential that adequate guidance is given, and publicised, as to the procedures that are expected in order for organisations to be able to rely on the defence offered by subsection 7(2). That surely is the reason why the Secretary of State was placed under an obligation to publish the guidance referred to in section 9.

6.2.4 However, we do not believe this is achieved through the structure of the guidelines that have been published in draft. In short, and as stated above, we do not consider that guidance given in respect only of applicable principles discharges the Secretary of State's statutory obligation to publish guidance about procedures.

6.2.5 Whilst the Attorney General's forthcoming prosecutorial guidelines may assist in providing further information about the approach to be adopted by the prosecuting authorities in considering whether to prosecute or not, we believe that individuals and commercial organisations cannot be expected to accept a general assurance about prosecutorial discretion as being sufficient guidance.

6.3 **Hospitality and promotional expenditure**

6.3.1 It is unfortunate that the Act does not include some limited "safe harbours" such as those found in the US *Foreign Corrupt Practices Act 1977* ("**FCPA**") in relation to reasonable and bona fide hospitality and promotional expenditure.

We believe the absence of safe harbours puts UK businesses at a competitive disadvantage, especially against US companies.

6.3.2 Through the guidance (or perhaps through the Attorney General's forthcoming prosecutorial guidelines, if the contents of these are to be made publicly available), the MoJ has an opportunity to ameliorate the difficulty which many commercial organisations are likely to face.

6.3.3 Whilst the absence of any safe harbour exemptions may not be of such concern in the context of the section 1 offence (given that it requires the prosecutor to prove that hospitality or promotional expenditure was intended to induce a person to perform improperly a relevant function or activity), we

[6] Which could have severe economic and reputational implications, not least of these being the mandatory debarment from eligibility to tender for public contracts anywhere in the European Union for an indefinite period of time pursuant to Article 45 of the 2004 EU Public Procurement Directive.

[7] In circumstances where the jury will be looking at this issue retrospectively after there has been a failure to prevent the bribery in question.

do not think the absence of safe harbours in the context of the section 6 offence is commercially sensible.

6.3.4 This is because the section 6 offence is very broadly drafted and, on its face, imposes criminal liability in respect of even small financial or other advantages that merely "influence" a foreign public official in his or her official role: in order to achieve a conviction, the prosecutor does not even have to prove that such influence was in any manner improper or corrupt.

6.3.5 We therefore believe that the guidance (or, if more appropriate, the Attorney General's prosecutorial guidelines if generally published) should offer some clear and specific guidance on the monetary levels of hospitality and promotional expenditure that would not give rise to prosecution; this could be confined to hospitality and promotional expenditure relating to government officials.

6.3.6 The introduction of clear and specific guidance of this type would provide UK individuals and companies that regularly interact with such officials a sufficient safeguard and would go some way towards redressing the competitive disadvantage likely to be suffered by UK businesses.

6.4 **Facilitation payments**

6.4.1 For reasons which are similar to those underpinning our general comments and those above regarding hospitality and promotional expenditure, we believe that commercial organisations ought to be provided with more detailed guidance and assistance in dealing with the problem of petty extortion by low-level government (and other) functionaries.

6.4.2 As noted above, it may be that the Attorney General's forthcoming prosecutorial guidelines are a more appropriate place for such guidance if these guidelines are to be generally published, but otherwise it would certainly be helpful if, by way of example, the guidance were to indicate that there would be a type and level of "facilitation payment" that would be disregarded when considering prosecution under section 7 of the Act. This was offered by Lord Bach during Parliamentary debate. Also, we would observe that other countries which outlaw facilitation payments (such as The Netherlands), have nevertheless issued clear enforcement guidelines which (in the case of The Netherlands) explicitly state that the Dutch Public Prosecution Office will not prosecute Dutch individuals or legal persons who make payments falling within the scope of the OECD definition of facilitation payment.

6.4.3 Moreover, given that a "facilitation payment" can trigger a section 6 offence no matter how small the payment is, we believe that the guidance should go further in giving individuals and commercial organisations clear and specific guidance on how to deal with petty corruption, as well as a *de minimis*, monetary threshold below which, as in The Netherlands, a one-off facilitation payment would not give rise to prosecution under section 6.

6.4.4 Once again, we do not consider that blanket statements regarding prosecutorial discretion offer sufficient certainty.

6.5 **Intelligence gathering**

6.5.1 In order to assist the Government in its desire to tackle the corrosive effect of petty extortion by low-level government (and other) functionaries in foreign countries, UK commercial organisations could be encouraged to collate and report intelligence on the petty extortion they encounter abroad. They

should be incentivised to do so, for example, by being given protection from prosecution under section 6 or section 7 for minor facilitation payments.

6.5.2 If widely adopted, such a system could operate to provide the Serious Fraud Office (or any successor agency) with timely intelligence on the countries or territories where petty extortion is affecting UK businesses. This intelligence could be shared with other national authorities in order to spur investigations and prosecutions of those responsible for the extortion.

6.5.3 Currently, many companies (particularly those which are either directly or indirectly subject to the FCPA) will already have accounting systems in place which identify and record facilitation payments, but they would (understandably) be reluctant to share this information with Government agencies without some comfort and protection on the issue of prosecution.

6.6 **Status of guidance**

6.6.1 We think it would be helpful if the guidance were given formal status with that status clearly stated on its face, i.e. that it is authoritative guidance, produced at the direction of Parliament, which (we should suggest) a court is obligated to take into account in any prosecution brought under the Act.

6.6.2 In addition, we suggest that the comment in the draft guidance that *"Organisations must continue to comply with sector-specific regulations and standards at all times"* should be removed or refined, as it is vague and likely to create uncertainty. In certain industry sectors there may be numerous associations promulgating "regulations and standards" that will be different and, in some cases, contradictory.

If you wish to discuss any of the above points, please contact Keith Stella or Aaron Stephens of Berwin Leighton Paisner LLP on 020 3400 1000 or at keith.stella@blplaw.com and aaron.stephens@blplaw.com, respectively.

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