

Final Adequate Procedures – Initial Analysis by Field Fisher Waterhouse LLP

Today the UK Government published long awaited guidance on the procedures that businesses need to implement to comply with the Bribery Act, which comes into force in July this year. The Act includes a controversial new criminal offence for businesses which fail to put “adequate procedures” in place to prevent bribery. Today's guidance provides clarification on what how far these procedures need to go and which companies will need to implement them.

We welcome the clarification provided today, which addresses a number of the points raised including:

- **Whether companies are considered to be conducting business in the UK and therefore fall under the Act.** The Government anticipates that in applying a common sense approach to the question of whether an organisation conducts part of its business in the UK the Courts will hold that organisations with no demonstrable presence in the UK are unlikely to be caught by the Act. This means a stock exchange listing on a UK market alone is unlikely to be sufficient to found jurisdiction but the ultimate arbiter will be the Court. Similarly the existence of a UK subsidiary is unlikely, in itself, to mean that an overseas parent company is conducting business in the UK but the courts will consider all relevant circumstances including the degree of independence enjoyed by the subsidiary. In presenting the guidance, the Minister of Justice, Ken Clarke made it clear that there is no general carve out for overseas companies whose only connection to the UK is a listing on a UK stock exchange or the existence of a UK subsidiary.
- **Facilitation payments.** These remain unlawful but the prosecutor must establish that a prosecution is just, fair and in the public interest. The joint guidance of the Serious Fraud Office and the Director of Public Prosecutions (also published today) indicates that if payments are self-reported to the SFO this would weigh in the organisation's favour against prosecution. Similarly, if the organisation can demonstrate a clear and appropriate policy setting out procedures an individual should follow if facilitation

- payments are requested and can show that these were correctly followed the SFO might be persuaded not to prosecute.
- **Hospitality.** 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.
 - **Bribes paid by third parties.** The Bribery Act requires companies to have robust procedures in place to prevent bribery being committed by employees or third parties providing services on their behalf. The guidance clarifies the definition of those “performing services” and means that commercial organisations will only be liable for bribes paid by third parties over which they have a degree of control. There is now less risk that companies unwittingly commit the corporate criminal offence as a result of an adviser, supplier or other business partner on the ground in another country, over whom it has little or no control, making an irregular payment.
 - **The definition of a business benefit.** For a company to commit an offence under the Bribery Act the bribe has to have given rise to a business benefit for that company. The guidance now makes clear that a direct and tangible business benefit for the business in the UK is required before the provisions of the Bribery Act bite. Group companies will not necessarily be liable for bribes paid by other entities in the group. The prosecutor must show that the bribe was paid for the direct benefit of the particular entity that is being prosecuted.

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