

## SELECT COMMITTEE ON THE BRIBERY ACT 2010

### Fieldfisher LLP's Response to Call for Evidence

Fieldfisher LLP regularly advises organisations in relation to the application of, and compliance with, the Bribery Act 2010. In particular in undertaking risk assessments and developing adequate procedures. The answers below are derived from our experience advising business in this arena.

#### *Deterrence*

1. *Is the Bribery Act 2010 deterring bribery in the UK and abroad?*

It is difficult to answer this question as there are no statistics for bribery before and after the Act. However, the Act has a wide reach with harsh penalties for non-compliance and therefore it has been taken seriously by business. It has certainly had the effect that businesses are more openly communicating their no tolerance approach to bribery which may have had a deterrent effect.

#### *Enforcement*

2. *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?*

It is a matter of record that there have been few prosecutions under the Act. It is possible that is because it has had the effect of deterring bribery so that there are few cases to prosecute.

#### *Guidance*

3. *Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*

No, the guidance is not clear and well understood.

The guidance fails to clarify some of the more complex concepts in the Act. For example, the question of whether commercial organisations are "conducting business" in the UK has caused uncertainty and confusion and the guidance provides no real indication of the extent of connectivity to the UK that will be required before corporate liability may apply.

Another example where the guidance is unclear is in relation to policies and procedures. The guidance suggests that commercial organisations must have in place policies and procedures which cover entities over which they have a degree of control. The concept of control did not feature in the Act but was welcomed by business when it appeared in the guidance. However, it remains unclear what level of control would be required to bring an associated entity within the net of a business's policies and procedures.

Additionally, there remains uncertainty as to who falls within (or who does not fall within) the definition of "associated person". This lack of clarity is particularly concerning as organisations are being forced to assume responsibility for the actions of an undefined set of third parties - a legal liability that they do not otherwise have and in circumstances where there is no obligation to exert control over these persons.

It has also been difficult for business to know where to pitch policies and procedures in relation to hospitality. The guidance states that it does not intend to prohibit reasonable or proportionate hospitality or other bona fide business expenditure but that levels of expenditure are not the only factor to consider. It is left to business to develop their own appropriate standards for such expenditure which has resulted in real uncertainty and a fear that any form of gift or hospitality may be viewed as a bribe.

It is our view that rather than introducing a new approach, the guidance should be improved to provide more practical pointers and examples for business so that they can be sure they are taking the right approach. This should include ensuring the key concepts referred to above are clarified as far as possible. Without a body of case law this is particularly important as it is the only source of guidance as to how the Act will be interpreted. In addition, we recommend that a de minimis level be set out in the guidance under which the provision of gifts and hospitality would not be considered a bribe. This would provide some level of certainty to business and avoid the unnecessary administrative burden that has been caused by reviewing and approving low level expenditure.

The guidance published by HMRC in relation to the Criminal Finances Act 2017 (which contains a "failure to prevent" offence and the requirement to implement policies to address the risks of the business in the same manner as the Act) sets out that in some circumstances it may be unreasonable to expect a business to put preventative procedures in place. This would be, for example, where the business' risks are assessed to be extremely low and the costs of implementing procedures disproportionate. There is no such statement in the guidance to the Act, which effectively says no matter how low an organisation's risk may be it still needs to put in place some form of procedures. We recommend that the guidance is amended to make it clear that having no procedures in place may be acceptable for some businesses.

## Challenges

4. *How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*

It is our experience that business has taken steps to put in place robust compliance regimes to address bribery risk. Normally this has been by firstly undertaking a risk assessment and then developing policies and procedures which address the principles. Depending on the business, this has often been a lengthy and costly process requiring significant external legal spend and the utilisation of extensive internal resources.

An area which has caused particular difficulty has been created as a result of uncertainty regarding the extent to which these policies and procedures should be rolled out to "associated persons" and who they are. It remains unclear the extent to which an organisation should seek to impose its own anti-bribery policies and procedures on intermediaries not within its control.

Another area of difficulty has been in relation to due diligence on third parties. The guidance provides that each commercial entity has a responsibility to carry out due diligence on those with whom it is doing business. It is not entitled to rely solely on the due diligence carried out by its business partners (even if it is extensive and/or they are in a regulated sector), leading to unnecessary cost and duplication. It is also unclear to what extent due diligence should be carried out on intermediaries and counterparties, again leading to unnecessary bureaucracy and cost as businesses feel they should err on the side of caution and undertake checks where they may not in fact be necessary. Similarly, in relation to aspects such as gifts and hospitality business has generally erred on the side of caution and set very low levels of

expenditure that can be made without approval. This has also led to an additional administrative burden (and therefore cost).

5. *What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

The main impact on SMEs has been in terms of the burden on them in ensuring they have in place adequate procedures and that these are rolled out to associated persons (including providing training), and in the extra work involved in due diligence and review.

SMEs often do not have an internal compliance function and have therefore been forced to incur external legal spend and/ or divert internal resources to do this. This also results in them being less likely to be able to effectively monitor and review their adequate procedures, leaving them open to corporate liability for bribery of which they are unaware.

6. *Is the Act having unintended consequences?*

No.

#### *Deferred Prosecution Agreements*

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?*

Yes, DPAs have been a positive development and represent a managed contractual outcome that provides certainty for a business within a reasonable time frame. They allow discussions to be entered into with the prosecuting authority at an early stage of an investigation.

Those DPAs which have been entered into to date have included a reduction in the penalty paid by one third or more (with Rolls-Royce obtaining a 50% reduction) and therefore they encourage co-operation with the prosecuting authorities. They also encourage self-reporting of bribery offences.

We consider that the likelihood of culpable individuals being prosecuted under the Act is in fact increased by the use of DPAs. For example, the Rolls Royce DPA contained a term that it fully cooperated in assisting the SFO as required with the prosecution of its former employees. The Standard Bank DPA contained details of the corrupt behaviour of the individuals involved.

#### *International aspects*

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

The Act is one of the most wide reaching and stringent pieces of anti-corruption legislation in the world.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*

UK businesses and individuals have to comply with the provisions of the Act wherever they operate. That can present challenges as business is done in very different ways in different countries. For example,

what is considered normal hospitality in one country may be excessive in another, and the giving of gifts may be expected in one country but would be unusual in another. There is a constant balancing act between not being seen to do anything which could be considered to infringe the Act and not offending business norms. This is challenging for businesses and the guidance offers little practical help (hence our recommendation to at least set a de minimis level). This is particularly difficult because business may not exert any control or have any visibility over what is happening in other jurisdictions.

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