



UNITED KINGDOM: PHASE 1ter

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

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INTRODUCTION

1. The United Kingdom ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) on 14 December 1998. Since that time, the U.K. has criminalised the bribery of foreign public officials principally by relying on the Prevention of Corruption Act 1906, the Public Bodies Corrupt Practices Act 1889 and the common law bribery offence. Until a 2001 amendment, none of these offences expressly referred to bribery of *foreign* public officials.¹ Corporate liability for foreign bribery was available under the common law.

2. Efforts to reform the U.K.'s patchwork of bribery offences date back over many years.² In the most recent Phase 2bis report in October 2008, the Working Group recommended that the U.K. "enact effective and modern foreign bribery legislation in accordance with the Convention at the earliest possible date and as a matter of high priority". It also recommended that the U.K. "adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery".

3. In April 2010, the U.K. enacted the Bribery Act 2010 which revamped its legislative scheme of bribery offences. The Act replaces the bribery offences described above with a specific offence of bribery of foreign public officials (Section 6) and general bribery offences that cover bribery of domestic and foreign public officials, and persons in the private sector (Sections 1 and 2). Corporate liability for these new offences would continue to be governed by the identification theory.³ In addition, the Act establishes a new offence of failure of commercial organisations to prevent bribery (Section 7). Finally, Section 14 establishes an offence against senior officers of a body corporate or partnership, where the body corporate or partnership commits a bribery offence under the Act with the consent or connivance of the senior officer. The full Act is found in Annex I of this report. At the time of this report's adoption, the U.K. expected the Bribery Act to enter into force in April 2011. The Working Group urges the U.K. to adhere to this deadline.

4. In June 2010, the Working Group decided to conduct this Phase 1ter evaluation to determine the Bribery Act's impact on the U.K.'s implementation of the Anti-Bribery Convention and the 2009 Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation). The Working Group's decision is consistent with its established practice in cases where legislative developments in its member countries could significantly affect the Convention's implementation. This Phase 1ter evaluation will focus on the offence in Section 6 of the Bribery Act, which is *lex specialis* on foreign bribery, and the corporate offence of failure to prevent bribery (Section 7) where appropriate. The general bribery offence (Section 1) may also apply to foreign bribery in certain circumstances but its primary policy goal is not to implement the Convention. Hence, this evaluation will consider Section 1 only where appropriate.

¹ Part 12 of the Anti-terrorism, Crime and Security Act 2001.

² For a fuller review of the past reform efforts, see OECD (2008), *Phase 2bis: United Kingdom*, paras. 23-35.

³ As described in the case of *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153 (H.L.).

1. ARTICLE 1: THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

5. Section 6 of the Bribery Act deals specifically with the 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.

6. Section 1 of the Bribery Act contains a general bribery offence that may also apply to foreign bribery:

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.

1.1 The elements of the offence

1.1.1 any person

7. Sections 1 and 6 of the Bribery Act apply to any “person”, a term which includes “a body of persons corporate or unincorporated”.⁴

1.1.2 intentionally

8. Section 6 of the Bribery Act creates an intentional foreign bribery offence. The offence applies to a person who intends to influence a foreign public official, and who intends to obtain or retain a business or an advantage in the conduct of business. Section 1 of the Bribery Act also creates an intentional offence. The offence applies to a person who offers, promises or gives an advantage with the intention of inducing or rewarding the improper performance of a relevant function or activity. It also applies to a person who knows or believes that the acceptance of an advantage would constitute improper performance of a relevant function or activity.

⁴ Interpretation Act 1978, Section 5 and Schedule I.

1.1.3 to offer, promise or give

9. Section 6 of the Bribery Act explicitly covers a person who “offers, promises or gives” a bribe to a foreign public official. Section 1 employs identical language.

1.1.4 any undue pecuniary or other advantage

10. Sections 1 and 6 of the Bribery Act expressly cover the offer, promise and giving of “any financial or other advantage”. Section 6 contains an additional provision. The official must not be permitted nor required by written law applicable to him/her to be influenced in his/her capacity as a foreign public official by the offer, promise or gift. Section 1 also contains a written law exception. These written law exceptions are considered in detail below.

1.1.5 whether directly or through intermediaries

11. Sections 1 and 6 of the Bribery Act expressly cover a person who, “directly or through a third party”, offers, promises or gives a bribe to a public official. A legal person may constitute a “third party” within the meaning of this provision, according to U.K. authorities.

1.1.6 to a foreign public official

12. Section 6(5) of the Bribery Act defines a foreign public official as a person 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, whether for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or 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. Section 6(6) defines a “public international organisation” as an organisation whose members are countries or territories; governments of countries or territories; other public international organisations; or a mixture of any of these entities.

13. The Bribery Act does not define the terms “public function”, “public agency” and “public enterprise”. According to the U.K. authorities, a court could rely on the Convention and its commentary to interpret these terms in the Bribery Act.

14. Section 1 of the Bribery Act is not limited to the bribery of public officials. The offence applies to the giving, offer or promise of an advantage to any person who performs a relevant function or activity. A relevant function or activity includes any function of a public nature; any activity connected with a business; any activity performed in the course of a person’s employment; and any activity performed by or on behalf of a body of persons (whether corporate or unincorporated). The person in question must also either be expected to perform the relevant function or activity in good faith or impartially, or be in a position of trust by virtue of performing it. A relevant function or activity need not have any connection with the U.K., and may be performed outside the U.K. (Section 3).

1.1.7 for that official or for a third party

15. Section 6 of the Bribery Act expressly covers the offer, promise or gift of a bribe to a foreign public official or to another person at the officials’ request or with the official’s assent or acquiescence. Section 1 also covers bribes given to a third party (Section 1(4)). As noted above, the term “person” includes any body of persons corporate or unincorporate. Accordingly, the U.K. authorities state that Sections 1 and 6 would cover third parties such as political parties, charities, non-profit organisations, associations, partnerships and all types of legal persons.

1.1.8 *in order that the official act or refrain from acting in relation to the performance of official duties*

16. The Section 6 offence applies to a person who intends to “influence [a foreign public official] in [the official’s] capacity as a foreign public official”. This means “influencing [the official] in the performance of [his/her] functions as such an official, which includes (a) any omission to exercise those functions, and (b) any use of the official’s position as such an official, even if not within the official’s authority” (Bribery Act, Section 6(4)).

17. Section 1 applies to a person who offers, promises or gives an advantage with the intention of inducing or rewarding the improper performance of a relevant function or activity. It also applies to a person who knows or believes that the acceptance of an advantage would constitute improper performance of a relevant function or activity. A relevant function or activity is performed improperly if it is performed in breach of a “relevant expectation”, or if there is a failure to perform the function or activity and that failure is itself a breach of a “relevant expectation” (Section 4(1)). A “relevant expectation” may be an expectation that the recipient of the advantage perform the function or activity in good faith or impartially. Alternatively, where the recipient of the advantage is in a position of trust by virtue of performing the function or activity, a “relevant expectation” is 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 (Section 4(2)). A “relevant expectation” is determined according to what a reasonable person in the U.K. would expect in relation to the performance of the type of function or activity concerned. However, where the performance is not subject to the law of any part of the U.K., 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 (Section 5). The definition of a relevant function or activity could thus exclude bribery in order that an official act outside his/her official competence.

1.1.9 *in order to obtain or retain business or other advantage; and in the conduct of international business*

18. The foreign bribery offence in Section 6 of the Bribery Act applies to a person who bribes a foreign public official with an intention “to obtain or retain business, or an advantage in the conduct of business” (Section 6(2)). For the purposes of this section, a trade or profession is a business (Section 6(8)). The Section 1 general bribery offence is not limited to business-related bribery.

1.2 **Complicity**

19. Article 1(2) of the Convention requires Parties to “take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.”

20. The U.K. authorities state that, under the common law, it is an offence to aid, abet, counsel or procure an offence, including any offences under the Bribery Act. The Accessories and Abettors Act 1861 further provides that any person who does so can be proceeded against as if he/she were the principal offender. Under the Serious Crime Act 2007 (which extends to Northern Ireland), it is also an offence to encourage or assist an offence under the Bribery Act whether or not the bribery offence is actually committed.

21. The U.K. authorities add that similar rules apply in Scotland. At common law, it is an offence to be “art and part” with another in the commission of an offence. Section 293 of the Criminal Procedure (Scotland) Act 1995 extends this principle to statutory offences and provides that any person who aids,

abets, counsels, procures or incites any other person to commit an offence against an enactment shall be guilty of an offence.

1.3 Attempts and conspiracy

22. Article 1(2) of the Convention further requires that “[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.”

23. In England and Wales, Section 1 of the Criminal Attempts Act 1981 provides that a person is guilty of attempting to commit an offence if he/she has the intent to commit the offence and commits an act which is “more than merely preparatory” to the commission of the offence. Under Section 1(1) of the Criminal Law Act 1977, a person is guilty of conspiracy to commit an offence if he/she “agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions”. The attempt and conspiracy offences apply to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, including domestic or foreign bribery. Similar provisions for Northern Ireland are found in the Criminal Attempts and Conspiracy Order 1983.

24. In Scotland, any attempt to commit an indictable crime is itself a crime (Criminal Procedure (Scotland) Act 1995, Section 294). Conspiracy is governed by the common law. The U.K. states that the common law conspiracy offence may include a conspiracy to commit a statutory offence, although this has not been tested in modern times. If the common law conspiracy offence does not apply to statutory offences, then the offence of aiding, abetting, counselling, procuring or inciting an offence (Criminal Procedure (Scotland) Act 1995, Section 293) would cover most cases, according to the U.K. authorities.

1.4 Exceptions and defences

25. This section considers the Bribery Act’s written law exception to the Act’s bribery offences and the issues of solicitation and small facilitation payments. The issue of adequate procedures designed to prevent bribery, which is a defence to the corporate offence of failure to prevent bribery, is discussed in the section below on liability of legal persons.

1.4.1 Written law

26. Commentary 8 on the Convention provides the following exception to the foreign bribery offence: “It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”

27. The Bribery Act’s foreign bribery offence states that a person bribes a foreign public official (F) “if, and only if [...] 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” (Section 6(3)(b)). Section 6(7) states that the written law applicable to the official is:

- (a) where the performance of the functions of F which [the person] 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,

28. The prosecution must prove these elements beyond a reasonable doubt in order to obtain a conviction under Section 6.

29. These provisions of the Bribery Act differ from Commentary 8 in two respects. First, Section 6(3)(b) of the Act states that it is an offence only if the foreign official (“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” (underlining added). In other words, unlike the Convention, the Bribery Act 2010 does not refer to written law that permits or requires an advantage. Instead, it refers to written law that permits or requires the foreign official to be influenced by the advantage.

30. The U.K. explains that the provision focuses on the legality of the influence rather than the advantage, to ensure that the exception would not apply to a case where it is only lawful for a foreign public official to accept a particular advantage but not for the public official to be influenced by the advantage. For instance, there may be circumstances where it is lawful for an individual to receive fast-track service in return for a payment to a foreign official, *e.g.* visas. Such payments should not be criminalised as bribes, in contrast to a situation where a customs official may receive a gift but the law does not permit that to be used as a basis for decision-making. There may also be circumstances in which it is lawful for a public official to be influenced by advantages to a third party. For example, a foreign public official may be legally required to take into account whether a commercial organisation bidding for a public contract has proposed to place part of the contract with local sub-contractors or to fund local infrastructure projects (i.e. an “offset” arrangement). Such a situation is not a crime, compared to a case where a foreign official is not legally permitted to allocate business on the basis of a donation to a charity of his/her choice.

31. A second difference between the Bribery Act and Commentary 8 is the choice of law governing the exception. Commentary 8 refers to an advantage that is permitted or required by the written law “of the foreign public official’s country”. The Bribery Act, however, refers the written law “applicable to [the foreign official].” This would be the law of the U.K. “where the performance of the functions of [the official] which [the person giving the advantage] intends to influence would be subject to the law of any part of the United Kingdom” (Section 6(7)).

32. The U.K. authorities explain that the different choice of law in the Bribery Act is meant to address relatively limited situations. Ordinarily, the law of a foreign public official’s country will govern the functions of foreign public officials, and in particular the extent to which such officials are permitted or required to be influenced by an offer, promise or gift. However, there may be exceptional cases where the performance of functions by a foreign public official is subject to the law of a part of the U.K. Examples include where:

- (a) The law of a foreign official’s state specifies that the performance of functions by that official in the U.K. is subject to U.K. law.
- (b) A foreign public official working in the U.K. is subject to an international convention, to which the official’s state is party, and the convention provides the same.
- (c) An official of a foreign state is seconded to an international organisation to work in the U.K. under rules that require the performance of the functions to be governed by the law of the U.K.
- (d) An official of a foreign state is seconded to the government of the U.K. where the employment contract provides that the law of the U.K. will govern the performance of the relevant functions.

33. The Section 1 general bribery offence also contains a written law exception. However, the primary policy goal of Section 1 is not to implement the Convention, and hence this exception will not be discussed here.

1.4.2 Solicitation and small facilitation payments

34. The U.K. authorities state that it is not a defence to the Sections 1 and 6 bribery offences that a foreign official solicited an advantage. The Act also makes no exception for small facilitation payments. However, a prosecutor may exercise his/her discretion not to prosecute a particular case involving a small facilitation payment.⁵ As with all offences in the U.K., a prosecutor will exercise his/her discretion in favour of prosecution only if there is a realistic prospect of conviction and if prosecution is in the public interest.⁶ The U.K. expects to issue guidance for prosecutors throughout the U.K. on how to exercise prosecutorial discretion in their jurisdiction. However, it is unclear at the time of this report whether the guidance would deal specifically with the issue of small facilitation payments.

2. ARTICLE 2: RESPONSIBILITY OF LEGAL PERSONS

35. Article 2 of the Convention requires each party to “take such measures as may be necessary to establish liability of legal persons for the bribery of a foreign public official”.

2.1 Liability of Legal Persons for Foreign Bribery under the Bribery Act 2010

36. The Bribery Act retains the traditional regime of corporate liability based on the identification theory described in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153 (H.L.). A company will thus be held liable if its corporate organs or officers that are deemed to be its “directing mind” commit foreign bribery under Section 1 or 6 of the Act. In addition, Section 7 of the Bribery Act creates a new offence of 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—
 - (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—

⁵ In addition, a prosecution may proceed only with the consent of the Director of the Serious Fraud Office, Director of Public Prosecutions, or Director of Revenue and Customs Prosecutions (Section 10).

⁶ The Code for Crown Prosecutors (February 2010), Chapter 4.

“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.

37. This Report will focus on the offence of failure to prevent bribery in Section 7 of the Act but will refer to the identification theory where appropriate. The Working Group has commented on the limitations of the identification theory on previous occasions. Among other things, the Group found that the restrictive definition of a company’s “directing mind” means that corporate liability is triggered only by the acts of a board of directors, managing director, and perhaps other superior officers. Liability also cannot be based on aggregating the knowledge/states of mind of different people.⁷ The Working Group’s earlier analysis applies equally to the identification theory under the Bribery Act.⁸

2.2 Legal entities subject to liability

38. The offence of failure to prevent bribery in Section 7 of the Bribery Act may be committed by “a relevant commercial organisation”. This term includes bodies incorporated and partnerships formed under the law of the U.K., and which carry on a business in the U.K. or elsewhere. It also includes bodies incorporated or partnerships formed in the U.K. or elsewhere, and which carry on a business or a part of a business in the U.K. A trade or profession is considered a business. A “partnership” is defined as a partnership under the Partnership Act 1890, or 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 U.K. (Section 7(5)). The U.K. authorities add that state-owned or controlled bodies may also be considered “relevant commercial organisations”.

39. Section 7 of the Bribery Act applies to a narrower range of legal persons than liability under the identification theory for the Section 6 foreign bribery offence. The identification theory allows liability to be applied to “a body of persons corporate or unincorporate”. Unincorporated bodies such as trusts can thus commit offences in the U.K., though prosecutions of such bodies are difficult in practice. The prosecutor must prove the individual guilt of each of the persons with an appropriate level of authority who

⁷ See the Working Group’s Phase 2 Reports on the U.K. (paras. 195-206) and New Zealand (paras. 178-190). See also the Phase 2bis Report on the U.K. (paras. 66-92).

⁸ Since the Working Group made this analysis, two legal persons have been convicted in the U.K. of foreign bribery under the identification theory as a result of guilty pleas (*R. v. Mabey & Johnson* (25 September 2009) and *R. v. Innospec* (26 March 2010)).

are involved in the unincorporated enterprise.⁹ Section 7 of the Bribery Act also would not apply to bodies such as an unincorporated association or an unincorporated charitable organisation.

2.3 Standard of liability

40. The application of Section 7 comprises two steps. The prosecution must prove beyond a reasonable doubt that “a person associated with a relevant commercial organisation” has committed the foreign bribery offence as defined in Section 6 of the Act (Section 7(1) and (3)).¹⁰ Proof that the associated person has aided, abetted, counselled or procured such an offence will also suffice.¹¹ The prosecution need not actually commence proceedings and obtain a conviction against the associated person. It must, however, tender evidence in the proceedings against the commercial organisation to prove beyond a reasonable doubt that the associated person would be guilty of the foreign bribery offence if he/she were prosecuted (Section 7(3)). The onus then shifts to the organisation to prove, on a balance of probabilities, that it had in place adequate procedures designed to prevent persons associated with the organisation from undertaking foreign bribery (Section 7(2)).

2.3.1 Principal offenders covered

41. Section 8 defines “a person associated with a relevant commercial organisation”:

8 Meaning of associated person

- (1) For the purposes of section 7, a person (“A”) is associated with C [the company] 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.

42. An associated person need not have a “close connection” with the U.K. (Section 7(3)(b)) (see section 4.2 below for the full definition of a “close connection”). An associated person could thus be a foreign national or a foreign incorporated subsidiary (if the other requirements in Section 8 are met).

43. According to the U.K. authorities, this definition of “an associated person” ensures that liability arises only in appropriate circumstances. In particular, an organisation would not be liable for a bribe paid by someone who is not an associated person, for example a person who has no connection with the organisation, and over whom the organisation cannot exercise any control, even if the organisation benefited from the bribe. The U.K. authorities are considering whether the definition encompasses a person who is contracted to supply goods (as opposed to services) to a company.

⁹ OECD (2004), *Phase 2 Report: United Kingdom*, para. 196.

¹⁰ An associated person who commits an offence under Section 1 of the Act will also meet this requirement.

¹¹ Explanatory notes to the Bribery Act 2010, para. 51.

44. The U.K. explained that a company would be liable if a company retained an agent who performs no services for the company other than to bribe a foreign official on behalf of the company. For liability to arise under Section 7, an “associated person” must commit bribery intending to obtain or retain business or an advantage in the conduct of business for the company. Section 8(1) states that an “associated person” is someone who, “disregarding any bribe under consideration”, performs services for or on behalf of the company. If the sole task of an agent or intermediary is to commit foreign bribery, then once the bribe is disregarded, the agent or intermediary would not perform any other service for or on behalf of the company. This agent or intermediary would thus fall outside the definition of an “associated person”. However, the person who hired the agent or intermediary is guilty of committing bribery through an intermediary under Sections 1 or 6 of the Bribery Act. This person is also likely an “associated person”, i.e. he/she performs services for or on behalf of the company, for example as an employee. This would then be sufficient to trigger the company’s liability under Section 7.

45. Section 7 allows liability against a company for failing to prevent a second company (including a subsidiary)¹² from committing bribery but issues related to the identification theory continue to arise in these cases. In such a situation, an agent or employee of the second company who bribes a foreign official may not always be a person who performs services for or on behalf of the first company. If this is the case, then this person is not an “associated person” of the first company. The first company would then be liable only if the second company itself has committed bribery. However, the Act does not explain when the second company is considered to have done so. Presumably, the “identification theory” would apply to determine the second company’s guilt. This could be challenging, given the identification theory’s limitations described earlier.

2.3.2 Defence of adequate procedures designed to prevent bribery

46. A commercial organisation may escape liability from Section 7 of the Bribery Act by showing that it had in place adequate procedures designed to prevent persons associated with the organisation from undertaking foreign bribery (Section 7(2)). The organisation has the onus of proving this defence on a balance of probabilities. While the Act is silent on what constitutes adequate procedures, the Act also requires the Government to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from committing bribery. The guidance may be revised from time to time (Section 9).

47. At the time of this report, the U.K. has begun a public consultation on the form and content of the guidance. The U.K. authorities state that the guidance will set out general principles to assist commercial organisations in determining what, if any, bribery prevention measures will best suit their particular circumstances. The guidance will have general application to commercial organisations, and will not be binding or prescriptive. It also will not impose any direct obligation to adopt particular procedures or to follow the guidance. Section 9(3) also requires the Secretary of State to consult the Scottish Ministers before publishing the guidance. The U.K. has thus conducted the on-going consultation in liaison with the Scottish Government.

3. ARTICLE 3: SANCTIONS

48. The Convention requires a Party to punish foreign bribery with “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive

¹² The definition of “an associated person” expressly includes a subsidiary (Section 8(3)).

non-criminal sanctions, including monetary sanctions”. The Convention also mandates that, for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal penalties for the bribery of domestic and foreign public officials / Effective, proportionate and dissuasive criminal penalties

49. The Bribery Act provides the same maximum criminal penalties for domestic and foreign bribery. Natural persons are punishable by imprisonment of up to 10 years, an unlimited fine, or both (Section 11(1)). Legal persons who commit domestic or foreign bribery, or who fail to prevent domestic or foreign bribery, are punishable by an unlimited fine (Sections 11(2) and (3)). While there is no statutory maximum for fines, the courts are responsible for ensuring that the fines imposed in particular cases are proportionate to the gravity of the offence. The U.K.’s Phase 3 evaluation will examine in detail the actual fines imposed under the Bribery Act.

3.3 Penalties and mutual legal assistance

50. The U.K.’s ability to seek and provide mutual legal assistance (MLA) does not depend on the maximum penalty of the offence in question (Crime and International Co-operation Act 2003, Sections 7, 13 and 14). The U.K. authorities add that an applicable treaty may contain provisions on the maximum punishment or triviality of an offence.

3.4 Penalties and extradition

51. The Bribery Act’s criminal penalties against natural persons for foreign bribery are sufficient for the U.K. to seek and provide extradition. Extradition to the U.K. under a European Arrest Warrant is available if an offence is punishable by at least 12 months’ imprisonment. For extradition from other countries, there are no statutory requirements concerning the maximum punishment (though an applicable treaty may impose such requirements). For extradition from the U.K., dual criminality is not required in some cases (*e.g.* in certain cases under the European Arrest Warrant). When it is required, the conduct underlying the extradition request must be punishable by at least 12 months’ imprisonment (Extradition Act 2003, Sections 64, 137 and 148).

3.5 Non-criminal penalties and responsibility of legal persons

52. This part of the Phase 1 standard questionnaire is not relevant since *criminal* liability against legal persons for foreign bribery is available in respect of Sections 6 and 1 of the Bribery Act by virtue of the operation of the identification theory, a principle of common law. Liability under Section 7 of the Act is also considered criminal in nature under U.K. law.

3.6 Seizure and confiscation

53. Article 3(3) of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

3.6.1 Pre-trial seizure

54. The Bribery Act does not alter the regime for pre-trial seizure in foreign bribery cases. The Crown Court may issue a restraint order if a criminal investigation into foreign bribery has been started, and there is reasonable cause to believe that the alleged offender has benefitted from his/her criminal conduct. Property subject to a restraint order may be seized to prevent its removal (Proceeds of Crime Act 2002 (POCA) Sections 40-45). A customs officer or constable may also search for and seize cash in excess of GBP 1 000 if he/she has reasonable grounds to suspect that it is property that could be subject to confiscation or is intended for use in unlawful conduct (POCA Section 289-297).

3.6.2 Confiscation

55. The Bribery Act also does not alter the regime for confiscation in foreign bribery cases. The POCA provides three means of confiscation. First, the Crown Court may order confiscation against a person who has been convicted of an offence (such as foreign bribery) and who has benefitted from his/her criminal conduct. The person must pay an amount that is generally equal to the benefit (POCA Sections 6-13). There are parallel provisions under POCA for Scotland and Northern Ireland. Second, a magistrate (or in Scotland a Sheriff) may forfeit cash in excess of GBP 1 000 that has been seized and detained if he/she is satisfied that it is “recoverable property”, i.e. property obtained through unlawful conduct (POCA Section 298). Third, a court may order civil forfeiture of recoverable property of at least GBP 10 000 in the absence of a criminal conviction (POCA Section 266).

3.7 Monetary sanctions of comparable effect

56. As noted above, the Crown Court may order confiscation against a person who has been convicted of foreign bribery and who has benefitted from the crime. The order requires the person to pay an amount that is generally equal to the benefit (POCA Sections 6-13).

3.8 Additional civil and administrative sanctions

57. The Bribery Act does not expressly deal with additional civil and administrative sanctions for foreign bribery. The U.K. states that it has implemented Article 45 of Directive 2004/18/EC of the European Parliament and of the Council through domestic regulations.¹³ These regulations require mandatory debarment from public procurement for natural and legal persons convicted of “active deliberate bribery”. The two legal persons that have been convicted of foreign bribery described above were excluded from participation in a public contract under these regulations. The U.K. is considering whether mandatory debarment under these regulations would also apply to convictions for failure to prevent bribery under Section 7 of the Bribery Act. A CEO convicted of foreign bribery in a recent case was also disqualified from acting as a company director for five years. The U.K. did not provide information on other types of civil and administrative sanctions for foreign bribery.

4. ARTICLE 4: JURISDICTION

4.1 Territorial jurisdiction

58. Article 4(1) of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in

¹³ Public Contracts and Utilities Contracts Regulations 2006.

whole or in part in its territory”. Commentary 25 to the Convention clarifies that “an extensive physical connection to the bribery act is not required”.

59. The foreign bribery offence in Section 6 and the general bribery offence in Section 1 of the Bribery Act are considered to have been committed 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” (Section 12(1)). The U.K. authorities explain that this provision applies if any part of the conduct element takes place in the U.K.; there is no requirement for the act or omission to be an essential element of the offence.

60. For the Section 7 offence of failure to prevent bribery, an offence is committed irrespective of whether the acts or omissions which form part of the offence take place in the U.K. or elsewhere. Where no act or omission which forms part of the offence takes place in the United Kingdom, proceedings for the offence may be taken at any place in the U.K. (Sections 12(5) and (6)).

61. The U.K. states that the Bribery Act does not apply to Crown Dependencies (CDs) or the Overseas Territories (OTs).

4.2 Nationality jurisdiction

62. Article 4(2) of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

63. Under Section 12 of the Bribery Act, the U.K. may also have jurisdiction over a crime of foreign bribery under Section 6 or 1 of the Act in cases where no act or omission which forms part of the offence takes place in the U.K. Two conditions must be met. First, the person’s acts or omissions done or made outside the U.K. must form part of a foreign bribery offence if done or made in the U.K. Second, that person must have a “close connection” with the U.K., i.e. 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;
- (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; or
- (i) a Scottish partnership.

64. The Bribery Act does not extend jurisdiction to legal persons incorporated in the CDs and the OTs *per se*. The offence of failure to prevent bribery under Section 7 of the Act would apply to a legal person incorporated in a CD or OT only if such a legal person carries on a business or a part of a business in the U.K.

4.3 Consultation procedures

65. Article 4(3) of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

66. The U.K. states that the Serious Fraud Office has a system of internal processes for vetting and selecting cases. Where the facts of a case do not meet the test set out in the Code for Crown Prosecutors, the Director may, in appropriate cases, seek an alternative disposal. In cases which attract the interest of more than one law enforcement agency within the U.K., the relevant agencies discuss and agree on a case-by-case basis which agency will be responsible for the case. Similarly, where there is jurisdictional overlap with foreign authorities, the relevant U.K. law enforcement authority will consult its overseas law enforcement counterpart to determine the appropriate formal jurisdiction for prosecution.

4.4 Review of bases of jurisdiction

67. Article 4(4) of the Convention requires each Party to “review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.”

68. The U.K. authorities state that the Bribery Act extends extraterritorial jurisdiction to prosecute natural persons for bribery offences committed overseas. Section 12(4)(g) of the Bribery Act confers jurisdiction to prosecute extraterritorial foreign bribery offences committed by foreign nationals ordinarily resident in the U.K. This is wider than the previous statutory criteria, which is based on U.K. nationality.¹⁴ This extension of jurisdiction was intended to reflect modern migration patterns and business practices.

5. ARTICLE 5: ENFORCEMENT

69. Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved”.

5.1 Rules and principles regarding investigations and prosecutions

70. The Bribery Act changes the rules and principles regarding foreign bribery investigations and prosecutions in one respect. The Bribery Act abolishes the existing requirement that foreign bribery prosecutions be commenced only with the consent of the Attorney General. Instead, criminal proceedings in England and Wales for an offence under the Act may be instituted only with the consent of the Director of Public Prosecutions, Director of the Serious Fraud Office, or Director of Revenue and Customs Prosecutions (Section 10). In deciding whether to consent, the relevant Director will apply the law and framework of principles set out in the Code for Crown Prosecutors and the supplementary guidance issued by the Directors and Attorney General.

71. Under the Bribery Act, the commencement of foreign bribery proceedings in Northern Ireland requires the consent of the Director of Public Prosecutions for Northern Ireland or the Director of the Serious Fraud Office. For Scotland, the U.K. authorities state that all prosecutions are instituted by

¹⁴ See Section 109 of the Anti-Terrorism Crime and Security Act 2001.

prosecutors from within, or acting on behalf of, the Crown Office and Procurator Fiscal Service, acting under the direction of the Lord Advocate. In practice, no prosecution would be instituted without instruction from Crown Counsel.

72. The Bribery Act does not affect the Attorney General's power of superintendence over the Director of Public Prosecutions, Director of the Serious Fraud Office, and Director of Revenue and Customs Prosecutions. In July 2009, the Attorney General and these three prosecuting departments signed a Protocol setting out how the Attorney General and the Directors of the prosecuting departments exercise their functions in relation to each other. The Working Group will consider the Protocol, along with the related issues of consent to prosecute and Attorney General superintendence, in its assessment of the U.K.'s Written Follow-up Report to the Phase 2bis evaluation.

73. The prosecutor has discretion over whether to proceed under Section 1 or 6 of the Bribery Act in a specific case, according to the U.K. Where the evidence permits proceedings to be instituted for alternative charges, it is open to a prosecutor to select the appropriate charge based on his/her independent assessment of the case. The general principles on charging and the exercise of prosecutorial discretion apply.

5.2 Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved

74. The Bribery Act does not directly address whether the investigation and prosecution of foreign bribery will be "influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved".

6. ARTICLE 6: STATUTE OF LIMITATIONS

75. Article 6 of the Convention requires that any statute of limitations with respect to foreign bribery provide for "an adequate period of time for the investigation and prosecution" of this offence.

76. The prosecution of offences under the Bribery Act is not subject to any limitation periods *per se*. However, a defendant has a right to a fair and public hearing within a reasonable time (Human Rights Act 1998 and the European Convention on Human Rights, Article 6(1)).

7. ENTRY INTO FORCE OF THE BRIBERY ACT

77. The Bribery Act enters into force "on such day as the Secretary of State may by order made by statutory instrument appoint" (Section 19(1)). The Act also requires the Secretary of State to consult the Scottish Ministers before bringing the Act into force. At the time of this report's adoption, the Government had announced its intention to commence all provisions of the Act in April 2011.

78. The Bribery Act would not apply where a bribe payment is made *after* the Act's entry into force and is part of an offence that was commenced *before* that date. Such a payment would be governed by the bribery offences that existed prior to the Bribery Act's entry into force. This is because Section 19(5) states that the Bribery Act "does not affect any liability, investigation, legal proceeding or penalty for or in respect of [an offence under the pre-existing law] which is committed wholly or partly before the coming into force of [the Bribery Act]." Section 19(6) adds that "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."

EVALUATION OF THE UNITED KINGDOM

General comments

79. The Working Group on Bribery congratulates the U.K. for enacting the Bribery Act. The Act is the culmination of a long and sometimes difficult process of reforming of U.K. bribery law. The Working Group notes, however, that the Bribery Act was enacted in April 2010 but has still not entered into force as of the time of this report. The U.K. has stated publicly that the Act would enter into force by April 2011. The Working Group strongly urges that the U.K. meet this deadline and bring its bribery law reform to a successful conclusion.

80. When it enters into force, the Act will be a major improvement on the prior patchwork of U.K. bribery laws. The foreign bribery offence in Section 6 of the Act adopts almost all of the features in Article 1 of the OECD Anti-Bribery Convention. A new corporate offence of failure to prevent bribery in Section 7 supplements the existing regime of corporate liability under the common law identification theory. This new offence follows the approach recommended by the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹⁵ On its face, the Bribery Act conforms to the Convention, with some issues for follow up noted below. The Working Group also expresses its appreciation of the U.K.'s continuous co-operation and dialogue during the Bribery Act's preparation.

Specific issues

1. *Written law exception*

81. Under Section 6 of the Bribery Act, a person bribes a foreign public official (F) "if, and only if [...] 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". The written law applicable to F is generally the law of the official's state. However, this could be U.K. law or rules of a public international organisation in exceptional cases.

82. The written law exception in Section 6 is a clear departure from the Convention. Commentary 8 on the Convention states that it is not an offence under the Convention if the written law of the foreign official's country permits or requires the *advantage* given to the official. The test is thus whether the advantage – not the influence on the official – is permitted or required by the written law. Commentary 8 also focuses on the law of the foreign official's country and does not make exceptions for the law of the briber's country to apply. In the U.K.'s Phase 3 evaluation, the Working Group will further look at whether the written law exception in Section 6 of the Bribery Act addresses its policy goals.

2. *Liability of legal persons*

83. The Section 7 offence of failure to prevent bribery significantly improves the existing regime of corporate liability for foreign bribery but nevertheless contains shortcomings. Unlike corporate liability under the common law, the offence does not apply to unincorporated bodies such as trusts, unincorporated associations or unincorporated charitable organisations. Also, there may be issues where an agent bribes a foreign official on the company's behalf but performs no other services, and where a company fails to prevent bribery committed on its behalf by a second company (including a subsidiary).

¹⁵ 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex I.

84. In addition, the Government has committed to publishing by January 2011 guidance to commercial organisations on adequate procedures to prevent bribery. The content and scope of the guidance, as well as its weight given by the courts, will impact the effectiveness of the Section 7 failure to prevent bribery offence.

85. For all of these reasons, the Working Group will need to examine liability of legal persons under the Bribery Act and the guidance to commercial organisations during the U.K.'s Phase 3 evaluation in March 2012.

3. *Jurisdiction*

86. The Bribery Act fails to address two jurisdictional issues related to Crown Dependencies (CDs) and Overseas Territories (OTs) raised in earlier Working Group reports. First, the Convention has not been extended to many of the OTs and which may not have foreign bribery offences. Even for those CDs and OTs to which the Convention has been extended, these jurisdictions may not have legislation that contains the modern features found in the Bribery Act. The U.K. can and has directly legislated in OTs in certain cases, notably where compliance with international conventions is at issue.¹⁶ The U.K. takes the position that, as a matter of good policy and administration, it consults OTs on the adoption of legislation rather than imposing legislation directly. But as the Working Group noted, lengthy inaction by the OTs despite consultations should be taken into account by the U.K. in deciding how to proceed.¹⁷

87. Second, the Bribery Act does not provide the U.K. with jurisdiction to prosecute legal persons incorporated in the CDs and OTs. It confers nationality jurisdiction to prosecute natural persons from the CDs and OTs, but not with respect to legal persons incorporated there. In this regard, the Act is identical to – and thus raises the same concerns as – the existing law.¹⁸ The Section 7 failure to prevent bribery offence would apply to a company incorporated in the CDs and OTs only if the company carries a business, or a part of a business, in the U.K.

88. These two deficiencies could limit the Bribery Act's effectiveness. Companies incorporated in the CDs and OTs but which do not carry on a business in the U.K. can be used to commit foreign bribery without fear of prosecution under the Bribery Act. This is a significant concern, given that many CDs and OTs are active international financial centres where many companies incorporate and/or operate.¹⁹

4. *Small facilitation payments and prosecutorial guidance*

89. The Bribery Act does not make an exception for small facilitation payments but a prosecutor may exercise his/her discretion not to prosecute such cases. The U.K. expects to issue guidance for prosecutors on how to exercise prosecutorial discretion in their jurisdiction. Whether the guidance will deal with small facilitation payments, such as the definition of "small", is unclear. The Working Group will also consider in detail the guidance, including its impact on the prosecution of small facilitation payments, in the U.K.'s Phase 3 evaluation.

¹⁶ U.K. Phase 2bis Report paras. 261-262.

¹⁷ See the Working Group's Report on the U.K. in Phase 2bis (para. 270).

¹⁸ The Working Group raised this concern in the U.K.'s Phase 2 (paras. 212-227) and Phase 2bis (paras. 261-262 and 270) Reports.

¹⁹ For example, the U.K.'s Phase 2bis Report (para. 268) noted that 802 850 companies were incorporated in the British Virgin Islands (an OT) as of June 2007.

5. *Entry into force*

90. The Bribery Act has not yet entered into force at the time of this report. The U.K. Government has announced its intention to commence all provisions of the Act in April 2011. The Working Group strongly urges the U.K. to honour this commitment. If the Act's entry into force is delayed, more bribe payments would be governed by the current, much weaker law.

**ANNEX
BRIBERY ACT 2010**

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—
 - (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,
 - (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.