



## Anti-Bribery High Level Principles & Guidelines for Independent Producers

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## A. **Introduction**

Informed by the Ministry of Justice's Guidance on the Bribery Act 2010<sup>1</sup>, these principles and guidelines have been collated by Pact with support from the BBC, ITV, Channel 4 and Channel 5. They represent a combined view of best practice in seeking to ensure compliance with the Bribery Act when working in the production field.

These guidelines set out recommended principles and safeguards that all production companies should consider implementing in order to have "adequate procedures" which provides a defence to prosecution for the section 7 offence.

However, they are intended to inform your company's response to the Act only and do not constitute legal advice on compliance with the Bribery Act nor are they intended to be prescriptive. The onus remains on individual production companies to take their own legal advice on this issue and to ensure that they have adequate procedures in place. The core principle is proportionality; combating the risks of bribery is largely about common sense and not burdensome procedures.

### 1. **Anti-Bribery Policy**

In order to avail of the defence of "adequate procedures" to the corporate offence of "failing to prevent bribery" (section 7 below), all producers should have their own company anti-bribery policy. Companies should commit at home and abroad to complying with the Act which has what is termed "extra-territorial jurisdiction"; offences committed abroad are offences under the Act and can be prosecuted in the UK. Your policy should focus on your dealings with your own staff as well as third-party service providers, external individuals and organisations you come into contact with during the course of your work, as your company may be liable for what those third parties do on your behalf. You should undertake appropriate due diligence considering the size of your company, the type of third parties you are dealing with and types of engagement you enter into, as well as provide appropriate procedures and practical advice for dealing with the key points set out in these guidelines.

### 2. **Filming/Programmes**

You should have adequate procedures in place for incorporating the principles generally applicable to your business and when in production. In creating appropriate procedures for a specific production you may wish to consider a number of factors, for example, the type of programme you are making, where you are filming, the Corruption Perceptions Index<sup>2</sup> and with who you are engaging or working with). This due diligence effort will be part of your adequate procedures.

### 3. **Consequences**

As a production company you need to be aware of the impact any breach of the Act may have on you. The penalties are listed at section C (5) of these guidelines and can include unlimited fines and up to 10 years imprisonment.

### 4. **Reputation**

In addition, production companies and their commissioning broadcasters can face adverse publicity and reputational damage in the event of a bribery allegation, impacting on relationships with companies with whom you do business, as well as debarment from tendering for European public contracts.

### 5. **Implementation, Monitoring, Reviewing and Reporting**

It is important that you ensure that all those engaged by you, whether freelancers, staff, workers, agents or sub-contractors, are familiar with the Act and your company policy, that they agree to comply with it when working for you and that you provide them with the necessary support to help them understand the importance of complying with the Act.

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<sup>1</sup> <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

<sup>2</sup> <http://www.transparency.org/research/cpi/overview>

You should also put in place safeguards to ensure that your policy is being implemented and where practical put in place an appropriate system for monitoring, reviewing and reporting on the effectiveness of your company's anti-bribery policy.

In relation to the new corporate offence of failing to prevent bribery, the only defence available to your organisation is that of having in place "adequate procedures" and your policy, its implementation, monitoring, review and reporting on it are fundamental to that. For example, if you have a company policy which is not monitored to ensure it is effective you may find it difficult to successfully avail yourself of an adequate procedures defence under the Act. The guidance issued by the Ministry of Justice<sup>3</sup> is a very useful document and establishes that the "adequate" in adequate procedures is intended to signify proportionality and reasonableness considering the size of your company and the nature of its business.

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<sup>3</sup> <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

## B. Bribery Act 2010

### 1. **Background**

The Bribery Act came into force on July 1<sup>st</sup> 2011, replacing and bringing together the then current bribery legislation in the UK that dated back to 1889.

### 2. **What is Bribery?**

A bribe is considered to be a form of inducement or reward offered, promised or provided in order to gain a commercial, contractual, regulatory or personal advantage, where the element of “improper performance” is crucial in relation to both the section 1 and 2 offences (but not, significantly, the section 6 offence of bribing a foreign public official). It can also be defined as an attempt to manipulate someone's judgement by financial or similar means. You may be wondering when a bribe is not a bribe. Extortion or blackmail do not fall under the Act. They are criminal offences dealt with under different legislation.

## C. Offences

### 1. **4 Offences** -The Act sets out four offences:

#### i) **Bribing another person** (section 1)

This means offering, promising or giving a bribe provided the person making the bribe intends the advantage to either induce the recipient to improperly perform a relevant function or activity or to reward that person for improperly performing a relevant function or activity.

#### Legislation

##### **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.

#### Example

A payroll company is vying for a contract with you to handle finance for your new drama. Whilst negotiating rates, they offer you, as a new client, a 20% reduction on their usual fee and will pay you, personally, £200.

The 20% reduction is fine as it constitutes a commercial discount (i.e. negotiation of the contract) but the further offer of payment to you personally appears to be a bribe as it is intended to encourage you to offer them the contract, whether or not they are the best placed to deliver the services. The payroll company may be guilty of an offence under section 1 because they are making the offer with the intention of encouraging you to behave improperly in awarding the contract to them. If you were to accept it you may be guilty of an offence under section 2, see below.

ii) **Accepting a Bribe** (section 2)

This means requesting, accepting, agreeing to or receiving a bribe, whether a financial or other advantage, intending that, in consequence, a relevant function or activity should be performed improperly whether by the person accepting the bribe or by another person.

**Legislation**

**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.

**Example**

You are taken out for dinner by a business contact and offered tickets to a show you really want to see. The offer is made on the basis that you will then cast an actor from the show in a programme you are about to start filming, as your contact thinks this person fits your brief perfectly. You aren't keen on the actor but you really want to see the show so accept the invitation. Unknown to you, your business contact wants the actor in your programme as the actor has promised to plug one of their products after they become famous in your show.

Your business contact may be guilty of an offence under section 1 in offering you the tickets to induce you to act improperly in casting an actor you would not previously have considered, as the business contact will ultimately benefit from the casting. You may be guilty of an offence under section 2 if you accept the tickets with a view to casting the actor as a result of the invitation. Even though the advantage does not appear to you to be for themselves, it is intended to influence you—whether you know it's for personal gain or not.

iii) **Bribery of a Foreign Public Official** (section 6)

This is where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions, where official functions are functions set out in law or other regulation in the country of operation – custom and practice is not enough to qualify as an official function. Improper performance or intent does not have to be proved under this offence.

Crucially, the element of impropriety is not required. Paying a public official to perform their official functions may be deemed a bribe<sup>4</sup>.

**Legislation**

**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.

<sup>4</sup> No requirement for improper performance was included in this offence because it was assumed it would be too difficult to prove.

**Legislation continued**

(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.

**Example**

You want access to a location and a government official has offered to speed up the process when you apply for a permit to film if you are able to give him an extra £100 - there isn't an official expedited service available but he will keep an eye out for your application and put it to the top of the pile.

If you were to agree to his offer and make the additional £100 payment it is likely to be considered a bribe under section 6 of the Bribery Act.

iv) **Failure of a commercial organisation to prevent bribery (section 7)**

A commercial organisation may be guilty of failing to prevent bribery where a person performing services for or on behalf of that organisation bribes (either under section 1 or section 6) another individual or organisation, intending to obtain or retain business or an advantage in the conduct of business, and the organisation is unable to make the defence of “adequate procedures” by having in place appropriate safeguards to prevent associated persons from engaging in acts of bribery. This is a strict liability offence.

To engage section 7 there does not need to have been a successful prosecution under section 1 or section 6 but there needs to be sufficient evidence to prove the commission of an offence.

A “commercial organisation” for the purposes of section 7 includes all recognised legal commercial entities, ie, companies, partnerships and corporations conducting some of their business in the UK. UK organisations and partnerships conducting business anywhere in the world may be liable also.

**Legislation**

**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.

**Example**

A post-production house is bidding for a service contract with you and their bid director suggests to your in-house lawyer that if she were to skew the requirements of the contract in their favour, they would share a percentage of their fee with her.

If your in-house lawyer accepted the bribe and changed the requirements of the contract accordingly she would most likely be guilty of accepting a bribe under section 2. However, there is no corporate liability for “associated persons” accepting bribes. Corporate liability under section 7 arises only where those persons offer a bribe on behalf of your organisation.

The post-production house would have fallen foul of the Act in this scenario because it was their employee who made the offer of the bribe on behalf of the company. The only defence available to the post-production house would be to evidence that “adequate procedures” to prevent bribery were in place at the time the offence was committed, such as a clear anti-bribery policy and training for all appropriate employees.

2. **“Associated Persons”** is defined under section 8 of the Bribery Act. A commercial organisation can be liable for bribes made by an associated person. Associated persons can be fixers, freelance service providers, agents, employees, all suppliers and anyone (whether an individual or an entity) who performs services on behalf of the commercial organisation in question.

**Example**

Without your knowledge, a fixer you have been using for years pays customs officials “unofficially” to speed up the processing of your equipment through customs.

That fixer is providing you a service and is an “associated person” under the Act and as a result you are responsible for his/her activities. Your organisation may be guilty of an offence under section 7 unless you can prove that you had in place adequate procedures to prevent your staff and contractors from engaging in this type of conduct. It is recommended that all your contracts with “associated persons” are established in writing and clearly state that you have an anti-bribery policy, which the contractor is expected to be familiar with and follow when working for you.

3. **Improper Performance**

It is important to note that both section 1 and section 2 offences require “improper performance” and also, indirectly, section 7 where a commercial organisation has failed to prevent bribery being committed.

Improper performance is defined in sections 3, 4 and 5 of the Act and involves a breach of an expectation of good faith, impartiality or trust. The test is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

4. **Gifts and Hospitality**

The Ministry of Justice guidance recognises ‘bona fide’ hospitality as an important and established part of doing business and clearly states that reasonable hospitality, such as taking clients out for dinner or providing tickets to sporting events, would not constitute an offence under the legislation.

All gifts and hospitality:

- Should be transparent, proportionate and appropriate, made in good faith and be an established and important part of doing business.

It is important to be aware that hospitality and promotional expenditure can form the basis of an offence of:

- bribing another person (section 1 – there must be an element of improper performance); or
- bribing a foreign public official (section 6 – intended to influence to business or an advantage)
- (under section 7) for a commercial organisation failing to prevent bribery.

When considering whether a gift/ entertainment is appropriate i.e. reasonable and proportionate, it is recommended that you have in place a clear company expenses policy setting financial limits in relation to the giving and receiving of gifts and entertainment. You may wish to consider keeping a gifts and hospitality register for expenditure over certain limits with approvals needed in advance from senior management in appropriate circumstances.

#### **Example**

A supplier sends you a case of wine for Christmas and has done so every year. Is this a bribe?

It is unlikely this would be considered a bribe. The Ministry of Justice Guidance (case study 4) explains that hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure which improves the image of a commercial organisation, to better present its products or services, or establish cordial relations would not be caught by the Act. It should be received without giving the impression that the recipient is under an obligation to confer any business advantage or that the recipient's independence will be affected. This case illustrates an established practice, as a gesture of goodwill intended to show appreciation or cement good relations. Depending on the vintage, it would seem to be a reasonable Christmas gift!

Crew within a particular department put money into a kitty to buy the Head of Department a lavish thank you gift worth several hundred pounds at the end of production. Is this a bribe?

That will depend upon the reason for the gift. If it is a genuine thank you given the circumstances of the shoot – say the HOD personally saved members of the crew from drowning – then, objectively it might be seen as perfectly acceptable, subject to whatever corporate policies govern gifts in the company where the crew and HOD work. Although this is a nice gesture, the crew and HOD need to be careful not to breach their company's policy on gifts and hospitality. If the purpose of the gift is to ensure reemployment or further work, it will almost certainly be perceived as a bribe and carry significant consequences. The production company's policy will provide a limit on the amount an individual can contribute to such a gift, for example £25 may be considered a reasonable amount, and this figure cannot be exceeded. It is also important that no crew member feels obligated to contribute to a gift. In this scenario, contributing more than the advised amount stipulated in a company policy for the purpose of gaining favour with a HOD so they will engage your services in future is an offence under section 1 of the Act. Secondly accepting a gift on this basis is also an offence under section 2 of the Act. The company's failure to prevent a bribe of this nature is an offence under section 7 of the Act. See below for details regarding penalties.

## 5. Penalties

The table below lists the type of penalties that can be attributed to offences under the Act:

<b>Penalties for the Individual</b> <u>As well as individuals associated with a company falling foul of the Act</u>	<b>Penalties for the Company</b> Companies/commercial organisations failing to prevent bribery
Unlimited Fine Confiscation of Assets under Proceeds of Crime Act 2002 Disqualification as a Director Maximum of ten years imprisonment	Unlimited Fine Potential to be permanently debarred from tendering for public sector contracts within the EU under the Public Contracts Regulations 2006 Companies can also be fined by sectoral regulators.

## D. Section 7 Defence under the Bribery Act

### 1. Adequate Procedures

There is a defence set out in the Bribery Act at section 7(2) in relation to the corporate offence of failing to prevent bribery. A production company has a defence if it can show that despite a particular case of bribery it has "adequate procedures" in place designed to prevent persons associated with it from committing offences under the Act.

The Ministry of Justice Guidance is particularly useful in this area. It considers that procedures which commercial organisations should put in place should be informed by six principles (set out in more detail below). These principles are established to assist businesses in satisfying the "adequate procedures" test, and the overriding principle of proportionality indicates that all procedures implemented in response to the Act should take into account the commercial organisation's size, nature and the scale of its activities, as well as the anticipated risks.

A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance. However, if you fail to ensure that your adequate procedures are implemented, monitored or reviewed to make sure they are effective, then whether the procedures are adequate for a defence will ultimately be a matter for the courts to decide on a case-by-case basis.

E. **The six principles to satisfy the Adequate Procedures defence**

1. **Proportionate procedures**

A company's procedures to prevent bribery should be proportionate to the bribery risks it faces and take into account the nature, scale and complexity of the organisation's activities.

Small production companies should not fear that they will suddenly need an army of lawyers in order to manage bribery risks. They might look to make staff aware of the legislation and Ministry of Justice Guidance, requiring them to familiarise themselves with their commissioning broadcasters' published policies now and each time they are commissioned by those broadcasters, with an open-door policy to senior management if any concerns need to be raised or discussed (see below).

2. **Top-level commitment**

The top-level company management should be committed to preventing bribery by persons associated with it by fostering a culture within the company that bribery is never acceptable. This commitment to bribery prevention is likely to include:

- i) communication of the organisation's anti-bribery stance; and
- ii) an appropriate degree of involvement in developing bribery prevention procedures.

In smaller companies a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures.

In multi-national companies the board should be responsible for setting bribery prevention policies, operating and monitoring bribery prevention procedures, and keeping these policies and procedures under regular review.

3. **Risk management**

The company should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by associated persons. The assessment should look to be periodic, informed and documented.

The purpose of this principle is to promote the adoption of **risk assessment procedures** that are proportionate to the organisation's size, nature and location of its activities. The fuller the understanding of bribery risks faced, the more effective its efforts to prevent bribery are likely to be.

4. **Due Diligence**

The company should consider an appropriate due diligence procedure, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the production company, in order to mitigate identified bribery risks. For example, due diligence is checking CVs, references for any directorship, general research, sight of anti-bribery policies.

5. **Communication, including training**

The company should look to have its bribery prevention policies and procedures embedded and understood throughout the organisation through internal and external communication where appropriate; including training that is proportionate to the risks it faces.

6. **Monitoring and review**

The bribery risks that a company faces may change over time, and are dependent on the nature of the programme/s it is making, filming location etc., as well as the nature and scale of the company's commercial activities, so the procedures required to mitigate those risks are likely to change.

Companies should monitor and regularly review the procedures in place and their effectiveness given the current activities of the organisation, ensuring that changes are made where necessary.

F. **Defence of Duress**

Duress is a possible defence to bribery offences even though not explicitly set out in the Act. It is a common law defence which may, the Ministry of Justice Guidance confirms, apply to Bribery Act offences committed under duress. However, in such circumstances the duress must take the form of imminent danger; the fear of loss of “life, limb or liberty”.

The safety of your employees, agents or freelancers should be of paramount importance and should underpin any company policy when dealing with a threat of, or fear of, violence or loss of liberty.

The DPP decision on whether to prosecute will take into account any potential situations of duress in assessing whether it is in the public interest to prosecute.

In any event, the DPP or Serious Fraud Office may consider that, depending upon the circumstances, where situations of genuine duress exist it is unlikely to be in the public interest to prosecute.

If a production is located in a high risk area, it is essential for all employees, agents or freelancers to undergo appropriate hostile environment training.

**Example**

A runner is stuck in an airport in an African country during a civil war. Officials have locked up all their equipment and refuse to release anything without receiving a payment of \$250 for “unofficial” administrative fees. The officials are armed, making the runner feel unsafe and anxious. There is only one plane out of the region every three days so she decides to pay the officials to get out of the situation as quickly as possible.

This type of facilitation payment would fall under the scope of the Act as it is an offence to bribe a foreign public official. However, as the runner feared for her safety, she and her production company may be able to successfully defend any prosecution under the Act by reason of duress.

## G. Prosecution under the Bribery Act

### 1. **England and Wales**

Bringing a prosecution under the Bribery Act in England and Wales will require the personal consent of, and is at the discretion of, the Director of Public Prosecutions (DPP) or the Director of the Serious Fraud Office (SFO).

He will make his decision in accordance with the Code for Crown Prosecutors - 'The Code'<sup>5</sup>. In deciding whether to proceed with a prosecution under the Act, the relevant prosecutors will adopt a two-stage process of review: firstly, whether there is sufficient evidence to prosecute for an offence under the Act and, secondly, whether a prosecution is in the public interest.

To understand the questions around the test of evidential sufficiency and public interest, production companies should read 'The Code' in conjunction with the DPP's Guidance for Prosecutors on Assessing the Public Interest in Cases Affecting the Media<sup>6</sup> which sets out the approach to the special application of the public interest defence in cases affecting the media and highlights the importance of considering the public interest served by freedom of expression and the right to receive and impart information.

### 2. **Scotland And Northern Ireland**

In **Scotland** the Police are required to report all Bribery Act cases to the Crown Office's Serious and Organised Crime Division (SOCD). All decisions about criminal proceedings in such cases will be taken by Crown Counsel, who represent the Lord Advocate and give instructions in the most serious cases.

In **Northern Ireland** – you should refer to the Director of Public Prosecutions and their Code for Prosecution.

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<sup>5</sup> [https://www.cps.gov.uk/publications/code for crown prosecutors/](https://www.cps.gov.uk/publications/code%20for%20crown%20prosecutors/)

<sup>6</sup> [http://www.cps.gov.uk/legal/d to g/guidance for prosecutors on assessing the public interest in cases affecting the media /](http://www.cps.gov.uk/legal/d%20to%20g/guidance%20for%20prosecutors%20on%20assessing%20the%20public%20interest%20in%20cases%20affecting%20the%20media/)

## H. **Facilitation Payments for the purposes of Production**

Although Government policy is essentially a “zero tolerance” approach to bribery, it is accepted by the Ministry that progress is likely to be gradual in eliminating the making of facilitation payments to foreign public officials in certain countries. The ambition is to move towards an eventual elimination of this form of bribery. So, while there is no exemption in respect of the making of “facilitation payments” under the Bribery Act – they fall squarely within the provisions of sections 1 and/or 6, it is anticipated that a staged resistance approach may be sufficient to avoid prosecution and also to evidence adequate procedures.

These guidelines suggest that staged resistance and adequate procedures might include extensive advance research and some steps to show resistance, at this stage of implementation of the Act:

### **Research**

- It is essential to plan well in advance in order to fully prepare yourself for any potential issues.
- When travelling, consider checking International and Ministry of Justice websites in addition to UK diplomatic posts or UK Trade & Investment for specific guidance on the area to which you are travelling.
- Check the Corruption Perception Indicator which scores countries on how corrupt their public sectors are seen to be and enables you to consider possible issues that may arise whilst filming in that country.
- If an area is considered high risk (in terms of safety and/or bribery) seek further advice from experts.
- When deciding to engage a fixer, ensure they are experienced, with knowledge of the local laws and procedures as well as a clear understanding of your company’s approach to bribery. You may also wish to consider providing an appropriate anti-bribery clause in the fixer’s contract.
- Fixers should also have an extensive knowledge of local customs and practices as well as the usual fees charged for official services, such as custom duties or visa fees as appropriate.
- Before you travel, make sure you know what permits and licences are required, what visas are needed and ensure that all your paperwork is in order before you leave, where possible. Try and get written confirmation from the appropriate embassy or consulate confirming that you have everything you need to comply with local laws and regulations.

### **Resistance**

- Where bribes are requested, always consider whether it is appropriate to resist paying the bribe in the first instance.
- Safety is of paramount importance, resistance should only be considered in situations where it feels completely safe.
- The full research and prior experience of your team on the ground should inform good judgement in each scenario. It is unlikely to be sensible or necessary to refuse a payment when anyone feels threatened with violence, imprisonment or fears for their safety (loss of their “life, limb or liberty”) or that of others. When it is safe to do so, question the legitimacy of any request made by officials, state that it is against your anti-bribery policy and that research has shown that it is against local law.
- Companies should consider how to monitor, and if appropriate record, these types of unavoidable production payments.

### **Other Points to Consider**

- Is the request for payment actually a bribe or could it be considered to be the negotiation of a contract for services or a change in pre-existing payment terms?
- Do the circumstances amount to duress – the fear of loss of life, limb or liberty - or perhaps extortion or blackmail which would not amount to an offence under the Act.

I. **Related links**

The Bribery Act:

<http://www.legislation.gov.uk/ukpga/2010/23/contents>

The Ministry of Justice's guidance is available at:

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>,

Joint Prosecution Guidance of The Director of The Serious Fraud Office and the Director of Public Prosecutions is available at:

[http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)

Code of Crown Prosecutors:

[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/)

SFO Guidance on Corporate Prosecutions:

<http://www.sfo.gov.uk/about-us/our-policies-and-publications/guidance-on-corporate-prosecutions.aspx>

DPP Guidance on Assessing the Public Interest in Cases Affecting the Media

[http://www.cps.gov.uk/legal/d\\_to\\_g/guidance\\_for\\_prosecutors\\_on\\_assessing\\_the\\_public\\_interest\\_in\\_cases\\_affecting\\_the\\_media\\_/s](http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/s)

Scotland, Lord Advocate Prosecution Policy and Guidance:

<http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance>

Northern Ireland, Director of Public Prosecution:

<http://www.ppsni.gov.uk/Code-for-Prosecutors-5017.html> Transparency Internationals - Corruption

Perceptions Index

<http://www.transparency.org/research/cpi/overview>

UKTI Overseas Business Risk

<http://www.ukti.gov.uk/export/howwehelp/overseasbusinessrisk/countries.html>