COMMENTS BY THE UK ANTI-CORRUPTION FORUM ON THE PROPOSED BRIBERY BILL PUBLISHED BY THE MINISTRY OF JUSTICE

Section One

Introduction

1. The UK Anti-Corruption Forum is an alliance of UK business associations, professional institutions, civil society organisations and companies with interests in the domestic and international infrastructure, construction and engineering sectors. Organisations which are members include the Association for Consultancy and Engineering, British Expertise, the Chartered Institute of Building, the Institution of Civil Engineers, the Institution of Mechanical Engineers, the Institution of Structural Engineers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Purchasing & Supply, Engineers against Poverty and Transparency International (UK). These organisations represent over 1,000 UK companies and 350,000 professionals. Members also include many UK construction companies and consulting engineering firms.

2. The Forum's objective is to create a business environment that is free from corruption, giving rise to fair competition.

3. Bribery, fraud and facilitation payments are an acknowledged problem in the infrastructure, construction and engineering sectors, both in the UK and overseas (although the prevalence of such occurrences is far more significant in many overseas jurisdictions than it is in the UK). The Forum has extensive experience and understanding of the practical nature of these problems and believes that it can, therefore, make a valuable contribution to this consultation in helping to formulate a law which addresses the main issues and which is comprehensible to the wider public.

4. The Forum would be happy to meet with representatives of the Ministry of Justice or other relevant body to discuss the proposed bill or the contents of this submission.

General comments

5. The Forum supports the reform of the law of bribery in England and Wales. It agrees that the present law is outdated and uncertain. Comprehensive reform though the enactment of coherent and clear legislation is overdue. At present, the complexity and uncertainty makes it difficult not only to prosecute bribery cases, therefore penalising companies which do not engage in corrupt practices, but also for the public and business properly to understand the law, and for business efficiently to train staff.

6. The Forum also accepts that the proposed bill would, in general, provide a modern and clearly defined offence of bribery, and ensure bribery law is consistent with the United Kingdom's international obligations. The Forum therefore broadly supports the proposed bill, subject to the points made below, and hopes that legislation will be enacted as soon as possible. Schedule 1 attached lists the key points which the Forum supports.

7. This submission covers the following areas: specific comments on the proposed Bill; the treatment of facilitation payments; and the need for a comprehensive overhaul of bribery laws to deal with the penalty of mandatory exclusion (debarment) from tendering for public procurement contracts on conviction for bribery.

Section Two

Clause Two: Bribery: Offences relating to being bribed

8. The bill proposes four offences covering the receipt of bribes, expressed as Cases. The formulations of the offence are complex, and possibly overly so, although the Forum accepts that it is difficult to frame legislation to cover all of the ways in which bribes or other illicit advantages are demanded or received. The Forum accepts that the proposed offences are an improvement on previous proposals and on the existing law, and are workable, both in simplifying prosecution of bribery and in making easier for business to train staff.

9. However, the Forum submits that there are difficulties requiring rectification with the wording of the recipient offences. In the Case 3 and 5 offences, it may be possible for a payment to be <u>received</u> as a bribe even though it was not <u>paid</u> as a bribe. There are three problems with this:

   (a) It may create a new offence where none previously existed. For example, P innocently takes R out for dinner. At the time, R intends to allow the dinner to influence him to perform an improper act. Under the proposed Bill, R has committed an offence, even without performing an improper act and even though there was no corrupt intention on P's part.

   (b) It may criminalise as bribery conduct which is not bribery as currently understood. For example, a window company offers a legitimate commission in good faith to a sales representative based

on volume of sales, but from the outset the representative intends to and does deceive customers as to the window quality in order to increase sales and hence his commission. Under the current law there would be no offence until a fraudulent misrepresentation was made, and then the offence would be one of fraud by the sales representative. There would be no bribery offence. Under the proposed bill, the commission could be treated as a bribe in the hands of the representative because he agreed to receive it *"intending that, in consequence, a function or activity … would be performed improperly".*

(c) There could be reputational damage to innocent parties. This may arise, for example, where a company innocently pays a sum to an agent who, unknown to the company, intends to or does use that payment as a bribe. The agent may be convicted of bribery in relation to the receipt of the money from the company (under the current law, the agent would only be convicted in relation to the subsequent corrupt action, not merely for corrupt intent in receiving the money). Whilst the paying company would not have committed a criminal offence, it may nevertheless unfairly suffer reputational damage by association with the conviction, as it was the payer of the money which was deemed to be a bribe.

Clause Four: Bribery of foreign public officials

10. The Forum supports the criminalisation of bribes paid to a foreign public official.

11. As drafted, the bill does so in two ways. First, the general offences contained in clause 1 of the draft bill apply to bribes offered, made, received or demanded overseas under the extra-territorial provisions contained in clause 7 of the bill. Secondly, clause 4 of the proposed bill contains a specific and stand-alone offence of bribery of a foreign public official. Each offence has differing ingredients, and the existence of overlapping offences introduces complexity which risks confusion. The Forum agrees that a discrete overseas offence is justified on the basis of the need for the United Kingdom to demonstrate compliance with its international obligations to deter and punish corrupt transactions taking place overseas, and to assist the Courts to interpret the scope and nature of the offence against the 'evolving background' of the OECD Convention. However, attempt should be made to reduce the risk of confusion between the two sections dealing with overseas bribery.

12. Clause 4 of the proposed bill does not extend to inculpate the foreign public official who accepts the bribe. Whilst it may be rare that foreign public officials will be prosecuted in England, the Forum sees no reason why the possibility should be excluded. Both the payment and the acceptance of a bribe is a corrupt act and should be criminalised, as would be the case for bribes paid to a domestic public official. It is possible for bribes to be paid directly or indirectly to accounts held by foreign public officials in England and Wales**.** It would be morally reprehensible for a company which pays a bribe to a foreign official to be convicted of bribery, and as explained below be debarred from future public contracts, and yet witness the public official using his corrupt assets to shop freely in London.

Clause Five: Failure of commercial organisations to prevent bribery

13. Under clause 5 of the proposed bill, a company or other commercial organisation may be liable for a new offence of negligently failing to prevent bribery.

14. Under the proposed bill, it would be a defence to show that adequate procedures had been implemented by the company or organisation to prevent bribery. This defence would not be available if the negligence complained of is that of a "senior officer" (defined as a director, manager, secretary or officer of the defendant).

15. This would be a new offence. The Forum supports its creation in principle, as it will encourage companies to implement, maintain and enforce anti-bribery procedures, systems and controls. It will therefore reward companies which do so, and penalise those that do not. The Forum believes that this is the correct approach to corporate liability in this area.

16. However, it is not clear how in practice the offence and the defence to it will be interpreted, and the Forum believes that there are some significant areas which require further consideration. Otherwise, there will be uncertainty for business, which could result in an offence being committed inadvertently. In particular:

    (a) It is not clear what compliance procedures will be considered as "adequate".

    (b) It is not clear in what circumstances the defence would not apply. The Forum is concerned about the inclusion of the term "manager" in the definition of "senior officer" in clause 5(7) of the proposed bill. This is an imprecise term and it is unclear how widely it will be construed by the courts. In large organisations, it could include quite junior managers.

    (c) The test of "negligence" is a very low standard for criminal law, and "gross negligence" would seem more appropriate for a serious offence of this nature.

17. The Forum recognises that seeking comprehensively to deal with these issues in legislation would be difficult, and would introduce unwelcome complexity. However, the Forum submits that guidelines should be published which do so (ideally agreed between prosecuting agencies and relevant business groups, and published a reasonable time prior to the introduction of the offence). In particular, the guidelines should describe in detail the components of adequate compliance procedures. In the United States a degree of guidance is given on these issues in the "Federal Sentencing Guidelines for Organizations," issued by the U.S. Sentencing Commission and applicable to criminal violations of federal statutes such as the Foreign Corrupt Practices Act, which criminalises the bribery of foreign public officials.

18. The Forum would be willing to assist in the drafting of appropriate guidelines.

19. As explained in the section on debarment below, it is unclear whether it is intended that mandatory debarment would apply to conviction for the proposed offence of failure of commercial organisations to prevent bribery. The Forum considers that it would be unfair for it to do so.

20. The Law Commission, in a report leading to the publication of the draft bill, proposed that the offence of failure to prevent bribery should apply only to companies and limited partnerships whose registered office is in England and Wales. The Forum supports the extension of the offence under the bill to companies which carry on business within the jurisdiction. The Forum proposes that it is further extended to companies whose shares are traded on an exchange in the jurisdiction, and to foreign companies which negligently fail to prevent bribery in circumstances where a step is taken in the jurisdiction as part of a corrupt scheme. Consideration should also be given to extending the application of the offence to foreign companies in receipt of UK public funds (for example from the Department of International Department), in relation to projects for which the funds are provided.

Clause Seven: Offences under sections 1, 2 and 4: extra-territorial application

21. Clause seven of the proposed bill would extend criminal liability to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the United Kingdom (and other individuals listed in clause 7(4) of the draft bill)[1]. The Forum agrees with this approach.

22. It does not however agree with the limitation on extra-territorial application contained in clause 7(4). In particular, it believes that liability should apply to overseas companies with a place of business in the United Kingdom, or which trade in the United Kingdom, or whose shares are traded on an exchange in the United Kingdom. It should also extend to companies incorporated under the law of a Crown Dependency or an Overseas Territory.

Section Three

Facilitation payments

23. The Forum believes that facilitation payments must be expressly dealt with. “Facilitation payment” means a payment made to induce a person to perform a duty which that person is obliged to perform, without resulting in preferred treatment, and where that payment is over and above any payment that is legitimately due.

24. Facilitation payments are often small. However, in some cases, facilitation payments may be very significant in size. For example a company may be forced to make a large payment so that an

[1] The proposed offences would also apply to citizens of British Overseas Territories, British Nationals (Overseas), a British Overseas Citizens, British subjects and British protected persons.

engineer will properly perform his duty to certify that work has been completed and payment is due to the company.

25. It is important to distinguish facilitation payments from a payment made to obtain preferred treatment, for example to move the payer up the queue, or to obtain a license which is not properly due. Small payments of this nature are sometimes mistakenly believed to be facilitation payments. That is wrong. They are bribes and are correctly treated as such in the proposed bill.

26. Facilitation payments are both damaging and illegal in many countries, and the Forum wishes to see their elimination. The Forum believes that facilitation payments should be a criminal offence if paid in the United Kingdom regardless of their amount.

27. However, facilitation payments made in many overseas jurisdictions are far more problematic:

    (a) The payer of a facilitation payment is normally considerably less culpable than the recipient. This is because the payer is the victim of extortion and it is often unjust to make a payer guilty of an offence which it may be difficult to avoid committing. In many cases, a company may be forced to make such payments in order to obtain import or work permits to enable it to fulfill contractual obligations, failing which it would incur heavy penalties.

    (b) A further difficulty is that minor facilitation payments are endemic in many jurisdictions. In addition, many payers of minor facilitation payments are junior employees travelling or working overseas who may be compelled to make these payments in difficult circumstances involving traffic police or immigration officials.

28. These and similar issues mean there is considerable debate as to whether facilitation payments made overseas should be criminalised and prosecuted in the UK. There is also considerable confusion and uncertainty as to liability for facilitation payments and whether or not they constitute bribery.

29. The OECD Convention does not require the criminalisation of facilitation payments. Some examples of how facilitation payments made overseas are dealt with in other jurisdictions are as follows:

    (a) In the USA and Canada, a payment made to a foreign public official to expedite or secure the performance of a routine government action is not prohibited[2].

    (b) In Australia, a payment made to expedite or secure the performance of a routine government action of a minor nature is not criminal if the payment is of a minor nature and a record is kept of the payment[3].

[2] Section 78dd-1(b) of the Foreign and Corrupt Practices Act 1977 and Section 3(4) of the Corruption of Foreign Public Officials Act 1998.
[3] Section 70.4 of the Criminal Code 1995

(c) In New Zealand, a payment made to a foreign public official to ensure or expedite the performance of a routine government action is not criminal when the value of the payment is small[4].

30. Facilitation payments would be criminalised under the proposed bill. However, in its report preceding publication of the bill, the Law Commission recognised that they pose particular difficulties, and suggested that it "will be rarely in the public interest to prosecute… for the payment of small sums to secure the performance of routine tasks". It suggested that facilitation payments are best handled through sensible use of the discretion not to prosecute.

31. The possible options in relation to facilitation payments paid overseas are as follows:

(1) **To make all facilitation payments an offence.** The argument against this option is the injustice in making those liable who are the victims of extortion and who have no option but to make the payment.

(2) **To make all facilitation payments an offence, but to have an express policy that these offences will not be prosecuted.** This is the current situation in the United Kingdom, and is the approach taken in the draft bill.

(3) **To make facilitation payments an offence, except those which involve minor payments.** The benefit of this option is that it will exclude the large majority of facilitation payments, which tend to be small routine payments. There will, however, be difficulty in establishing what is meant by “minor payment”, although other jurisdictions have felt able to do so. Also it will mean that those persons who are the victims of extortion for large payments will incur criminal liability – even where they may have perceived that they had no choice but to make the payment. This option would therefore unfairly favour those who have made only minor payments when, in reality, there is no greater culpability in being forced to make a large payment.

(4) **To make all facilitation payments an offence, but to allow certain circumstances to constitute a defence or to be taken into account in sentencing.** Circumstances which might constitute a defence could include extortion. Circumstances which may affect sentencing could include extortion, commercial or personal necessity, safety, the size of payment, whether the extortion was reported, and what efforts the person made to avoid making the payment. For example, in the latter case, did a company approach the authorities or its local embassy to ask for help? Whilst this option may involve a person incurring criminal liability, it would nevertheless provide a means of dealing more fairly with those who have been the subject of extortion.

[4] Section 105C of the Crimes Act 1961

(5) **To make all facilitation payments an offence, except those which involve minor payments, and to allow certain circumstances as a defence or to affect sentencing for larger payments (as in (4) above)**.

32. In relation to facilitation payments made overseas, the Forum has been unable to reach a consensus on the correct approach due to the significant difficulties in identifying a fair and effective solution to this issue. However, consensus has been reached on the following points:

(a) There should be a clear distinction between bribery and facilitation payments.

(b) There needs to be certainty as to the circumstances in which a facilitation payment will be prosecuted, and the circumstances in which it will not.

(c) There also need to be certainty as to how facilitation payments should be accounted for in a company's books and records.

(d) At present, there is considerable uncertainty on these issues and that uncertainty will continue if the proposed bill becomes law. That uncertainty does not assist with training staff, implementing compliance programmes and combating bribery and corruption.

(e) If facilitation payments are to be outlawed, detailed guidance should be published on these issues.

(f) If facilitation payments are treated as criminal offences, the penalty for making a facilitation payment should be lower than that of a bribe, to reflect the fact that the payment is normally extorted or made under urgent necessity to meet commercial or personal obligations.

(g) The payer of a facilitation payment should not face mandatory exclusion (debarment) from public procurement contracts, a point developed below.

<u>Debarment</u>

33. One of the penalties for bribery is the exclusion (debarment) of companies from participation in public sector projects. The Forum supports the use of debarment as one of a range of anti-corruption actions provided that debarment is implemented in a fair and efficient manner, and that the penalty is proportionate to the offence committed.

34. Some forms of debarment are mandatory, requiring a purchasing body to exclude from tendering any company which has been convicted of corruption. This is the case in the European Union under directives which have been implemented in England, Wales and Northern Ireland[5].

35. Those regulations provide for mandatory exclusion of a company from public sector and utility contracts if the company, or its directors, or any other person who has powers of representation, decision or control of the company, have been convicted of bribery, fraud, money laundering, cartels and specified other offences[6].

36. There are currently potential material injustices in the way that debarment law is currently framed:

    (a) debarment under EU Directives presently applies however minor the offence - mandatory debarment would apply for example to conviction for making facilitation payments;

    (b) no regard is had to any mitigatory factors which should be encouraged (for example whether the company took steps to prevent the offence, self-reported the offence, co-operated with the authorities, has robust and effective internal anti-corruption procedures etc).

37. These points are explained in more detail in the Forum's discussion paper entitled "Fair and efficient debarment procedures". A copy is attached as Schedule 2.

38. The Forum believes that a thorough review of bribery law should consider debarment, and result in the current law on debarment being replaced with a law which applies fair and proportionate penalties.

39. It is unclear whether it is intended that mandatory debarment would apply to conviction for the proposed offence of failure of commercial organisations to prevent bribery. The Forum submits that it would be unfair for it to do so. Further, the Forum submits:

    (a) it would be unduly harsh for a conviction for making a facilitation payment automatically to lead to debarment;

    (b) companies that can demonstrate robust and effective internal anti-corruption procedures should not face mandatory debarment if convicted for an isolated example of bribery.

UK Anti-Corruption Forum

22nd May 2009

[5] The EU Public Sector and Utilities Procurement Directives 2004, which came into effect in April 2004. England, Wales and Northern Ireland implemented the Directives on 31st January 2006 by means of two Regulations: “The Public Contracts Regulations 2006”, and “The Utilities Contracts Regulations 2006”.

[6] Regulation 23 of the “Public Contracts Regulations 2006” and Regulation 26 of the “Utilities Contracts Regulations 2006”

SCHEDULE 1

The Forum supports the following key elements of the proposed bill:

1. The repeal of the existing common law and statutory offences, and their replacement with a comprehensive bill setting out the potential liability of the payer of the bribe and the recipient, and related offences.

2. The objective of ensuring that English law is in compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

3. The decision to abandon the "principal offender/accessory" and “primary reason” tests initially proposed in the Law Commission’s initial Consultation[7].

4. Subject to the comments in the body of the Forum’s submission:

   4.1 the criminalisation of bribes paid to a foreign public official (Clause 4 of the proposed bill), and the definition of "foreign public official" (Clause 4(6));

   4.2 the proposed introduction of the offence of failure to prevent bribery, in part intended to encourage companies to implement, maintain and enforce procedures, systems and controls designed to prevent bribery (Clause 5);

   4.3 the proposed extra-territorial application of the general offences (Clause 7).[8]

5. The Forum has not reached a consensus on whether consent should be needed to bring a prosecution, but has reached a consensus that if consent is required it should as recommended be that of the senior prosecuting authorities, and not of the Attorney General.

6. The following provisions which are consistent with the Fraud Act 2006:

   6.1 The proposal that an individual director, manager, or equivalent person who consents to or connives at the commission by a company of one of the general offences or the offence of bribery of a foreign public official, will himself or herself commit the offence (Clause 8)

   6.2 The proposed penalties (Clause 11).

[7] “REFORMING BRIBERY: A CONSULTATION PAPER”
[8] And other individuals listed in clause 7(4) of the draft bill.

SCHEDULE 2

FORUM'S DEBARMENT DISCUSSION PAPER – 15.05.07

DISCUSSION PAPER

UK ANTI-CORRUPTION FORUM

FAIR AND EFFICIENT DEBARMENT PROCEDURES

INTRODUCTION

1. "Debarment" is the procedure under which a company is prevented from participating in a project for a specified reason (e.g. a corruption conviction). It is sometimes referred to as "exclusion" or "blacklisting".

2. Examples of debarment are where:
   a) Funders deny project finance, guarantees or insurance to a company or project owner which is found to have been involved in corruption.
   b) Project owners exclude from the tender list any company which is found to have been involved in corruption.

3. Some forms of debarment are mandatory, and require a purchasing body to exclude from tendering any company which has been convicted of corruption (for example, exclusion under the EU Procurement Directives). Other forms of debarment are discretionary, and do not rely on a conviction (for example, debarment by the World Bank).

4. The wide-spread publicity given to debarment, and the increase in due diligence undertaken by procurement authorities, makes it increasingly likely that debarment by one organisation will lead to debarment by another.

5. For a company, debarment is the equivalent of imprisonment for an individual. It is depriving the company of the freedom to undertake business. Debarment of a company for any significant length of time may result in the economic destruction of that company. It would be unable to obtain work or retain staff, and may as a result have to be wound up, or be broken up and sold. Its pension fund may be placed at risk. Therefore, similar principles of jurisprudence must apply to the debarment of a company as to imprisonment of an individual.

6. The UK Anti-Corruption Forum supports the use of debarment as one of a range of anti-corruption actions provided that debarment is implemented in a fair and efficient manner. This discussion paper recommends certain minimum requirements which are necessary for fair and efficient debarment procedures.

THE OBJECTIVES OF DEBARMENT PROCEDURES

7. Debarment procedures should have four primary objectives:
   a) To deter companies from committing corrupt acts.
   b) To punish companies which commit corrupt acts.
   c) To encourage companies to implement effective anti-corruption policies.
   d) To encourage companies to deal promptly and openly with any instances of corruption, and to co-operate with the authorities in the investigation and prosecution of corrupt acts.

THE REQUIREMENTS OF DEBARMENT PROCEDURES

8. In order to achieve these objectives, debarment procedures should:
   a) be implemented in accordance with good judicial practice;
   b) be transparent;
   c) be uniformly applied;
   d) provide incentives as well as penalties.

   These requirements are examined in more detail below.

Good judicial practice

9. Debarment is a severe penalty. Both the procedures for determining whether or not there should be a debarment, and the procedures for determining the length of the debarment, should follow good and consistently applied judicial practice.

10. **Determining whether or not there should be a debarment:**

    a) Where debarment is mandatory: If a company has been convicted of corruption, and is facing debarment under a mandatory procedure:
       i) If the company facing debarment is appealing the conviction, the debarment should not take effect or be publicised unless and until the conviction is upheld by the appeal body.
       ii) The company facing debarment should be permitted a reasonable time, prior to the debarment becoming effective, to introduce evidence to the debarring authority that the conviction was obtained in a jurisdiction which did not follow due judicial process. If the company can provide satisfactory evidence to this effect, debarment should not be implemented under the mandatory procedure.

    b) Where debarment is discretionary: If a company is accused of a corruption offence, and is facing debarment under a discretionary procedure:
       i) The debarring authority should provide full disclosure to the company facing debarment of the evidence that it was involved in a corrupt act.
       ii) The company facing debarment should be permitted a reasonable time to prepare its defence against the allegations.
       iii) The company facing debarment should be permitted to provide to the debarring authority its documentary and witness evidence, and legal argument.
       iv) The debarring authority should only debar when it is satisfied beyond all reasonable doubt that the company facing debarment was involved in a corrupt act.
       v) The company facing debarment should be allowed a reasonable time to appeal the debarment decision to an independent appeal body.
       vi) If the company facing debarment does appeal the decision, the debarment should not take effect or be publicised unless and until the debarment decision is upheld by the appeal body.

    c) Where a company has been convicted or debarred, and the company is appealing such conviction or debarment, a procuring entity shall be entitled to request the company facing debarment to provide reasonable proof that it has implemented an effective anti-corruption programme as a condition of allowing it to tender during the period prior to the appeal being decided.

    d) In the case of both a) and b) above, debarment should not apply to contracts awarded prior to the debarment coming into effect. However, a procuring entity will retain the right to terminate a contract for corruption to the extent that right is granted under contract or by law.

11. **Determining the length of the debarment period:**

a) The length of the debarment should take account of the following factors:
   i) the severity of the offence;
   ii) the magnitude of the loss caused by the company's actions;
   iii) whether it is a first offence or a repeat offence;
   iv) the seniority of the relevant individuals responsible for the offence;
   v) whether the board of the company had authorised or acquiesced in the offence;
   vi) the steps taken by the company to prevent the offence occurring;
   vii) whether the company itself reported the offence to the authorities;
   viii) the extent to which the company co-operated with the authorities after the offence had been discovered;
   ix) whether the relevant individuals responsible for the offence have been dismissed or appropriately disciplined by the company;
   x) the impact on the company and its non-offending employees of a debarment.

b) At one end of the spectrum, where all the following factors are present, there should only be a nominal debarment: Where the corrupt payment is of a low value, causing minimal loss, and is committed by an employee of the company against the company's properly embedded policies and training, and in circumstances where the company discovered the offence, reported the offence, dismissed or appropriately disciplined the employee, and co-operated with the authorities.

c) At the other end of the spectrum, where all the following factors are present, there should be a material debarment. Where the corrupt payment is of a high value, causing significant loss, and is committed by an employee of the company with the authority or acquiescence of the board, and the company concealed the offence, did not report the offence, did not dismiss or appropriately discipline the employee and did not co-operate with the authorities.

d) A tariff should be developed and published which lists the approximate length of the debarment taking into account the factors listed in paragraph 11 a). The intent should be that the debarment creates a result proportionate to the circumstances of the offence.

12. **Reduction in debarment period:**

a) Once debarment of a company has been implemented, the company should be entitled to a significant reduction in the debarment period if it can provide satisfactory and plausible independent proof to the debarring authority that it has implemented an effective anti-corruption corporate programme.

b) Prior to the implementation of the OECD Convention on the Bribery of Foreign Public Officials and United Nations Convention against Corruption, business was conducted in many countries in a manifestly different international ethical and legal environment. To take account of this fact, in relation to offences committed by a company prior to 14th December 2005 (the date the UN Convention came into force), the debarment period should be terminated as soon as the company can provide satisfactory and plausible independent proof to the debarring authority that it has implemented an effective anti-corruption corporate programme.

<u>Transparency</u>

13. Debarment procedures should be transparent. It must be quite clear to a company, and to the general public, what offences will lead to debarment, what procedures will be adopted to determine the debarment, the range of debarment periods applicable, and the procedures for appealing or lifting the debarment. The decision and reasons of the debarring authority should be publicly available.

14. A register should be maintained which contains details of all debarred companies, and the relevant offence, the length of the debarment, and the reasons for the debarment. This information should be publicly available, and be easily accessible. Many organisations, as part of their due diligence, require to know whether or not a company has been debarred. This register will assist this purpose. Ideally,

one international register should contain details of all debarments, so that information can be obtained from a single source.

15. Procedures should be implemented which enable a company to procure correction of incorrect entries on the register.

16. Many organisations require disclosure by bidding companies of previous debarments. Criminal convictions are treated as "spent", and do not require disclosure after a certain period. Similarly, a debarment should be treated as "spent", and should not require disclosure, and should be deleted from the register, an agreed period of time after the debarment has ceased.

Uniformity

17. Debarring authorities should as far as possible co-ordinate their systems, so that debarment procedures and penalties are applied uniformly.

18. Exceptions to debarment rules should not be granted to companies with special political influence or a material share of the market.

Incentives

19. Of the four objectives listed in paragraph 7 above, objective a) is to deter and b) is to punish. The threat of debarment must be real and serious, which therefore acts as a deterrent. However, deterrence and punishment only form part of the objectives. As recognised by objectives c) and d), companies must be encouraged to:
    a) implement effective anti-corruption policies; and
    b) deal promptly and openly with any instances of corruption, and co-operate with the authorities in the investigation and prosecution of corrupt acts.

20. These aims are best achieved by rewarding companies for acting in this way. If a company knows that it will receive the same debarment penalty whether or not it itself uncovers and reports the offence, it will have no incentive to undertake internal audit and co-operate with the authorities. On the contrary, it may be encouraged to conceal the offence, as it will be aware that reporting will alert the authorities and result in no benefit. As a result, corruption will be driven underground, when preventing corruption is best achieved by bringing it out into the open.

21. The recommendations in this paper contain significant incentives for companies to implement anti-corruption policies, and to deal openly and actively with corruption. In particular, the recommendations that:
    a) the length of debarment takes account of mitigatory circumstances, reducing to a nominal period in the best case (paragraph 11 b) above);
    b) the introduction of anti-corruption systems can lead to a reduction in the debarment period (paragraph 12 a) above).

LIABILITY FOR THE ACTIONS OF OTHER COMPANIES

22. One of the most difficult issues in relation to debarment is the extent to which a company should be debarred for the actions of another company. The deterrent and punitive objectives of debarment would be neutered if an organisation could set up a series of single project companies, deliberately pay bribes to win work, and then, if one company is debarred, continue trading corruptly though the other companies. At the other extreme, however, it would be unfair and wrong for a company to be debarred for the actions of another company over which it had no control, and in circumstances where it had no complicity in the corruption.

23. The following general principles are suggested for further discussion with a view to achieving a fair and transparent system of dealing with this issue.

    a) If Company A is debarred for a corrupt act, and Company B authorised or was complicit in the corrupt act, Company B should also be debarred. This would include circumstance where

Company A is the parent or subsidiary company, or agent, joint venture or consortium partner, or sub-contractor of Company B.

b) The lengths of debarment of Company A and Company B should take account of the factors listed in paragraph 11. The debarment period for Company A could be different from that of Company B to take account of differences in the level of their involvement.

GUIDELINES

24. The complexity of the issue, and the need for certainty and uniformity, requires that international guidelines on debarment are drawn up and agreed. The UK Anti-Corruption Forum would welcome the opportunity to participate in this exercise.

CONCLUSION

25. Debarment of a company can be an effective method of deterring and punishing corruption. It forms an important part of an overall anti-corruption strategy. However, debarment is a potentially devastating penalty. It is therefore vital that debarment procedures are implemented in accordance with good judicial practice, are transparent, are uniformly applied, and provide incentives as well as penalties.

UK Anti-Corruption Forum

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The UK Anti-Corruption Forum is an alliance of UK business associations, professional institutions, civil society organisations and companies with interests in the domestic and international infrastructure, construction and engineering sectors. The purpose of the Forum is to promote industry-led actions which can help to eliminate corruption. The members of the Forum believe that corruption can only be eliminated if governments, banks, business and professional associations, and companies working in these sectors co-operate in the development and implementation of effective anti-corruption actions.

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