



## COMMENTS BY THE UK ANTI-CORRUPTION FORUM ON THE LAW COMMISSION'S "REFORMING BRIBERY: A CONSULTATION PAPER"

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### Section 1 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, Engineers against Poverty and Transparency International (UK). These organisations represent over 1,000 UK companies and 300,000 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. The Forum represents a wide spectrum of interests in the infrastructure, construction and engineering sectors. Members share a desire to eliminate corruption in these sectors. However, in respect of a consultation which is as detailed and complex as this one, it is impossible to obtain or to harmonise entirely the views of all members.
4. The Forum's views expressed in its submission are preliminary, and are based on the reasoning contained in the Consultation Paper. The Forum would wish to continue to be involved in the consultation process as it evolves. The Forum may also wish to revise its initial views if the consultation raises issues which the Forum has not considered.
5. Bribery, fraud and facilitation payments are widespread in the infrastructure, construction and engineering sectors. 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 business and to the wider public.
6. The Forum would be happy to meet with representatives of the Commission to discuss the issues raised if this would be useful to the Commission.

## Section 2

### General comments

7. The Forum supports the efforts of the Law Commission to reform the law of bribery in England and Wales. It is important that the law of bribery is expressed in a manner which is clear and fair.
8. The actual wording of the law as drafted is vital, and it is not possible, therefore, to give a final view until the draft wording has been considered. The Forum would wish to review and comment on any draft bill. In particular, the proposed legislation should be robustly tested against hypothetical and real case-studies to ensure, as far as possible, that potential injustices or loopholes are removed.
9. The Forum believes that the core offence of bribery should be drafted as simply as possible to cover the vast majority of bribery offences. If there are peripheral offences, or loopholes or exceptions resulting from the way the core offence is drafted, then these should be covered by separate provisions rather than try to make the core offence all encompassing. The latter would result in greater complexity and confusion.
10. The Commission is correct in using the word “bribery” rather than “corruption” for the purposes covered by the Consultation. “Bribery” is a well understood term, whereas “corruption” is frequently used in a much wider sense than bribery to include fraud, embezzlement, cartels and related offences. The Forum therefore believes that the term “bribery” should continue to be used in the legislation and in the title of the bill.

## Section 3

### Response to the Summary of the Law Commission’s Main Proposals (pages 9 to 11)

11. **PROPOSAL (1): In the domestic context the law of bribery should not draw a distinction between bribery in the public sector and bribery in the private sector**  

The Forum agrees in principle with this proposal.
12. **PROPOSAL (2): The existing statutory and common law offences should be repealed or abolished**  

The Forum agrees with this proposal.
13. **PROPOSAL (3): There should be a comprehensive bribery offence setting out the potential liability of the payer of the bribe (P) and the recipient (R)**  

The Forum agrees with this proposal.
14. **PROPOSALS (4) – (15):** These are addressed in Section 4 below.

## Section 4

### Specific Responses to Part 12 – List of Provisional Proposals and Questions

#### The Consultation Paper's proposed formulation of the bribery offence (paragraphs 12.2 to 12.28)

15. The Forum has some concerns relating to the Commission's proposals for the bribery offence. The Forum's view is that the Commission's proposed formulation of the offence in some respects has introduced a wrong focus which may result in a failure to capture situations which are normally considered to be bribery or conversely the capture of situations which are not normally considered to be bribery. The proposed formulation remains overly complicated, with the result that the law could remain difficult to understand and prosecute.
16. The Forum's concerns relate both to the conduct element (paragraphs 12.10 – 12.11 of the Consultation Paper) and the fault element (paragraphs 12.18 – 12.28).

#### The conduct element for R

17. The Forum believes that it is an error for the conduct element of R to focus on the performance of an improper act or the willingness to perform an improper act (paragraphs 12.10 – 12.11 of the Consultation Paper). This would not necessarily catch those situations where a person receives an advantage knowing that it was intended to influence him to perform an improper act, but who does not perform an improper act (or an improper act which is connected with the relevant advantage) and has not represented any willingness to do so. Examples are as follows:

**Example 1:** The representative of a company tendering for a contract visits the minister responsible for awarding the contract. The company representative explains to the minister that the representative will leave a suitcase of cash for the minister in his office in order to persuade the minister to award the contract to the company. The minister says nothing. The suitcase is left in the office. The minister takes the cash. The project is aborted because the funding arrangements fall through. So no contract is awarded to any company.

In the above example, it is questionable whether the minister's silence represents a willingness to act improperly in relation to the contract award. It may simply represent a willingness to accept the cash. Consequently, under the test in paragraph 12.11, the minister would not necessarily be guilty of bribery because he had not indicated any willingness to act improperly, nor had he acted improperly in relation to the contract award (in the way intended by the company representative). However, the layman's view would be that the minister was guilty of bribery because he took the money knowing that it was intended to influence him to perform an improper act.

**Example 2:** The facts are as above except that the project is not aborted. The minister awards the contract (improperly) to a company which he owns. Under the test in paragraph 12.11, the minister would not necessarily be guilty of bribery (for the reasons given in the previous example). In addition, the improper act would not be sufficient to make him liable under paragraph 12.11 because it is not an act connected with the money paid by the company. However, once again the layman's view would be that the minister would be guilty of bribery.

#### The fault element for R

18. **Focus:** The Forum believes that it is an error to move from the focus on R's knowledge or belief of P's intention, to a focus on a nexus between the conferral of the advantage and the improper act (paragraph 6.24). This has consequences which are contrary to the normal understanding of bribery and nature of culpability. Also, it complicates rather than simplifies the offence, and it creates potentially insoluble evidential difficulties. These difficulties are explained below in relation to the principal offender/accessory distinction and the "primary reason" test.
19. **Principal offender/accessory test:** The Forum believes that it is incorrect to suggest that there should be a difference in the criminality of "X" (treated as the principal offender) who accepts an advantage which is the primary reason for an improper act, and the criminality of "Y" (treated as an accessory) who accepts an advantage which is not the primary reason for an improper act

(paragraphs 6.12 – 6.15). The Forum does not see any basis for this distinction. Both X and Y are equally culpable. Their culpability should stem from the basis on which they solicited or accepted the advantage (e.g. knowing that it was given to influence them to perform an improper act), not from their motivation in performing an improper act. Furthermore, it is not entirely clear from the Consultation Paper in what circumstances the recipient will be principal offender and when it will be accessory. This ambiguity exists particularly in cases where no improper act is carried out by the recipient following the acceptance of the advantage. (Paragraphs 12.18 to 12.23 seem to suggest that an improper act must have taken place in order for R to be liable as principal offender.)

From the Forum's interpretation of the Consultation Paper, the Forum believes that the proposals would produce the following results:

- (1) P offers bribe – R accepts bribe – R performs expected improper act because of the bribe – R guilty as principal offender;
- (2) P offers bribe – R accepts bribe – R performs different improper act because of the bribe – R guilty as principal offender. (Examples 6D and 6E).
- (3) R solicits bribe – bribe is paid – R performs expected improper act but for a different reason – R guilty as accessory;
- (4) R solicits bribe – bribe is paid – R properly performs his duty – R guilty as accessory (Example 6G);
- (5) P offers bribe – R indicates he is willing to perform improper act – R accepts bribe – R does nothing further – R guilty as accessory;
- (6) P offers bribe – R indicates he is willing to perform improper act – R accepts bribe – project aborted before any contract award – R guilty as accessory;
- (7) P offers bribe – R indicates he is willing to perform improper act – R accepts bribe – R is dismissed from post before awarding any contract – R guilty as accessory;
- (8) P offers bribe – R accepts bribe – R performs expected improper act but for a different reason – R guilty as accessory (Example 6C);
- (9) P offers bribe – R accepts bribe – R performs different improper act for a different reason – R guilty as accessory.

In the layman's eyes, in all the above cases, R is equally culpable for bribery. However, on the basis of the proposals in the Consultation Paper, R is guilty as a principal offender in only 2 of the 9 examples. (This is the case even in examples (3) and (4) above where R initiated the whole bribery process.) The Forum believes that the correct analysis of the above would be that R should be liable for bribery in (1) to (9) (with no distinction between principal offender and accessory).

20. **Paragraph 12.19:** Even without the principal offender/accessory distinction, the fault element of R described in paragraph 12.19 would not be sufficient to catch situations where R would normally be considered guilty of bribery. Paragraph 12.19 refers to the *“recipient knowingly accepting .. an advantage ...realising that if the payer confers the advantage, the payer will do so with the intention to influence the recipient to act improperly.”* However, this formulation does not cater for the following:

- Where R solicits a bribe indicating to P that R will be influenced by the bribe to perform an improper act (whether or not R does intend to be influenced). In this situation, R would normally be considered guilty simply because he solicited the bribe, regardless of what he believes is in P's mind.
- Where R accepts an advantage believing (wrongly) that P is offering an advantage with the intention of influencing R to perform an improper act or as a reward for an improper act.

**The fault element for P and R: The “primary reason” test**

21. There are significant difficulties with the concept of “primary reason” in the fault element for the recipient (paragraphs 12.18 – 12.25) and the payer (12.26 – 12.28). The suggested fault element requires that the advantage conferred must be “the primary reason” for the recipient doing the improper act. The following issues arise:

- (1) **Evidential difficulties in proving a primary reason:** The Forum believes that, due to the difficulties in construing and proving the “primary reason” test, it will provide a great opportunity for defendants to introduce or fabricate reasons as to why advantages were conferred and why acts were carried out. It is also a difficult concept for juries to understand, and may be difficult to apply where contracts are awarded in other jurisdictions. It will introduce complexity and uncertainty, and will be an unnecessary hurdle to a successful prosecution.

The reasons for these evidential difficulties are as follows:

- What does “primary reason” mean? Would it apply in situations where a bribe may have simply “tipped the balance”?
- How will it be proved that it was the primary reason? For example, a minister who has awarded a contract to Company X which paid him a bribe may say in court that he believed that Company X's bid was the best and that was the primary reason for awarding the contract, and that the bribe had no effect on his decision. How will it be established that in fact the bribe was the primary reason? There is a risk that the relative merits of bids will have to be evaluated at trial, introducing unnecessary and potentially complex factual and expert evidence. Even if it could be shown that Company X's bid was not the best, the minister could still maintain that he believed it to be.
- Similarly, a director of Company X when asked in court whether he intended that the bribe (advantage) should be the “primary reason” for the minister to award a contract may say that he did not intend that the bribe should be the primary reason. He may argue that he believed that Company X was the strongest contender and that he knew that the minister's sister was a shareholder in Company X (and that these were in his mind likely to be the primary reasons for the contract award), and that he intended the bribe simply as a sweetener. How will it be established that the director in fact intended the bribe to be the primary reason for the contract award?
- These difficulties are highlighted by the common scenario where the advantage is conferred only after the contract is awarded to the company.

- (2) **Undesirable consequences of the “primary reason” test as shown in the examples in the Consultation Paper:**

- **Example 6C (paragraph 6.13):** This example maintains that R should only be an accessory and that this “accurately reflects the nature of R's criminality” (paragraph 6.15). The Forum disagrees. R should clearly be guilty of bribery as a principal offender. R received the bribe knowing why it was given. The fact that he awarded the contract primarily for a different reason does not lessen his culpability for bribery. If this were correct, then a minister who accepts a bribe while knowing that he has no intention of awarding the contract to the briber, would not be guilty of bribery as a principal offender. This goes against all common understanding of bribery.

It would also give rise to potentially insoluble evidential difficulties. Taking Example 6C, if P had paid R a bribe of £10 million to award the contract, yet R had 20 family members for whom he cared deeply and who were in desperate circumstances, how would one determine which was the primary reason for R awarding the contract? R would say (in order to avoid liability for bribery) that he made the award for family reasons. How would a jury choose between the two reasons in order to determine which was the primary reason? If the primary reason could not be established, R

would escape liability as principal offender, even though he had accepted £10 million pounds knowing that it was intended as a bribe.

- **Paragraph 6.21 and Example 6.22:** Paragraph 6.21 and Example 6.22 are unnaturally stretching the definition of bribery so that it covers situations which would not ordinarily be regarded as bribery at all, but only fraud. Taking Example 6.22: If an agent who is on a commission “mis-sells” products in order to increase his commission, and if the payer of the commission has no intention and has never indicated that this mis-selling should take place, then this cannot in any sense be construed as bribery on the part of the agent. It is a form of fraud by the agent. The agent is representing to the consumer that the product is suitable for the intended purpose, knowing that this is not the case, his reason being simply to increase his income. The payer has no involvement.

For the agent to be liable for bribery, there must *at least* be a *belief* in the agent’s mind that the payer is paying the commissions with the intention of influencing the agent to act improperly. Otherwise, this is simply not bribery. Consequently, the Forum’s answer to the question in 6.27 (and 12.25) is “Yes”.

- **Example 6D:** In this example, R is seen as liable because he acted on the bribe, even though he performed an act other than the one intended by P, the rationale being that “the nexus between the conferral of the advantage and the improper act remains intact (in R’s mind)”.

However, this would have the strange result that R would not be liable as a principal offender if the project was aborted so that no contract could be awarded. As the improper act had never been performed, it would not be possible to demonstrate any primary reason for its performance. Consequently, R may be saved from liability as principal offender simply by a chance of fate. Similarly, what would the position be if the act performed by R was not a breach of duty at all, even though the reason for his acting was because of the bribe? On the current proposals, he would again only be liable as an accessory. The Forum agrees with the conclusion in Example 6D that R is guilty of bribery, but not for the reasons given in paragraph 6.32. R is guilty simply because he accepted the advantage knowing that it was given to influence R to do an improper act.

- **Example 6G (and paragraphs 6.55 and 6.56):** In this example, the “primary reason” test has the consequence of treating R only as an accessory even though he initiated the whole bribery process and he accepted the bribe. (The fact that he was telling lies as to whether he would be influenced by the bribe is irrelevant.) This is the sort of bribery that occurs on many occasions, namely, bidders wish to act ethically but the project owner’s representative insists on bribes being paid. The primary reason test would quite wrongly treat the bidders as the prime culprits in this situation. It is clearly the case that R should be liable as principal offender (together with the bidders) in such circumstances.

- (3) **Complex distinctions:** The “primary reason” test creates complex distinctions – for the payer to be liable at all, he must intend that the bribe will be the primary reason for the improper act. However, for the recipient to be liable as a principal offender, the bribe must be the primary reason, but for the recipient to be liable as an accessory, it does not have to be the primary reason.

- (4) **Unjustified hierarchy of liability:** The “primary reason” test creates a hierarchy of liability, in terms of principal offenders and accessories, which goes against the common understanding of culpability for bribery. To demonstrate the possible resulting injustice, take the following example:

Competing bidders each pay a bribe to the same minister. He accepts the bribes from all of them, but awards the contract only to one of them. Using the primary reason test (if it could be proved), the minister would be guilty of bribery as a principal offender in respect of the bribe paid by the winning bidder, and as an accessory in respect of the other bribes. In the case of the bidders, if it could be proved that they intended the bribe to be the primary reason, then they would all be liable as principal offenders. However, it may not be possible to prove this in each

case, meaning that some of the bidders would be guilty of a criminal offence and some would not.

The layman's view of this case would be that the minister and bidders are all equally liable: the minister would be liable in respect of all bribes, and all bidders would be liable regardless of whether they intended the bribe to be the "primary reason" for the improper contract award. The layman would see the bidders' intention to seek to persuade the minister to perform an improper act as sufficient to establish their guilt, and the minister's acceptance of these bribes knowing the reason why they were given as sufficient to establish his guilt.

The injustice of the principal offender/accessory distinction is also demonstrated in paragraph 19 above.

The "primary test" thus causes an unsatisfactory and complex situation which we see as unnecessary and which goes against common understanding. It makes the whole issue of liability dependent upon the vagaries of whether there is an improper act, whether it can be shown that the advantage was the primary reason for R performing that act, and whether it was P's intention that the advantage should be the primary reason for R performing an improper act.

An additional concern is that there may be situations where the payer may escape liability because the primary reason test is not satisfied in relation to the payer (paragraph 12.26), and the recipient could only be liable as an accessory (because the primary reason test is not satisfied in relation to the recipient). If there were no principal offence, could the recipient be liable as an accessory? If not, then a recipient who has accepted a bribe (but not as a primary reason for an improper act) will escape liability altogether.

22. Whilst the Forum realises that the wording of the provisional proposals is not the final draft wording, the proposed offences have been drafted in a complex way and in a way that goes against common understanding. This suggests that the wording of the draft bill will be similarly complex, and may not catch certain situations or properly attribute liability. The very fact that the above uncertainties are being raised shows that the proposed formulation is not achieving the required objectives of simplicity and clarity.

#### **Alternative formulation for the bribery offence**

23. **Alternative formulation:** The Forum believes that a more simple formulation of bribery is possible without the above complexities and which more closely follows the common understanding of bribery. The Forum proposes the following as the basic concept for the offence. (The Forum is not attempting to propose any precise wording.):

*(1) A person commits an offence if he directly or indirectly –*

*(a) gives an advantage to or procures an advantage for any person, or*

*(b) offers or agrees to give an advantage to or to procure an advantage for any person,*

*with the intention that or believing that:*

*(c) that person or another person will or may be thereby influenced to undertake an improper act; or*

*(d) that person or another person will be thereby rewarded for undertaking an improper act.*

- (2) *A person commits an offence if he directly or indirectly –*
- (a) *obtains an advantage for himself or another person, or*
  - (b) *solicits or agrees to obtain an advantage for himself or another person,*
- and:*
- (c) *he directly or indirectly indicates to another person that the advantage will or may influence him or another person to undertake an improper act, or will be a reward for undertaking an improper act; or*
  - (d) *he knows or believes that the advantage is being or will be provided by another person with the intention that it will or may influence him or another person to undertake an improper act, or will be a reward for undertaking an improper act.*

The Forum also proposes that, if A offers or provides an advantage to B, B accepts the offer or advantage, and B performs an improper act which benefits A, then it should be a rebuttable presumption that A provided the advantage with the intention of inducing B to undertake an improper act, and also that B knew or believed that the advantage was offered or provided with that intention. This presumption should also apply when the advantage is provided after the improper act has taken place.

This presumption is to take account of situations where the facts strongly suggest bribery, but the mental element is difficult to prove as the only two witnesses are the two defendants. This would be particularly relevant to the common scenario where a bribe is paid by Company X after an improper contract award to Company X and there is no other evidence of a corrupt arrangement. It should apply in both the public and private sectors.

In innocent circumstances, this presumption should be relatively easy to rebut simply by showing the real reason why the advantage was provided.

The Forum is aware that the Law Commission has previously concluded that the absence of such a presumption would not make it more difficult to obtain convictions. However, the Forum believes that this is not correct. As is shown in the examples below, such a presumption would in some cases be essential (see Scenario 4 in paragraph 24).

24. **Testing the alternative formulation:** The above formulation proposed by the Forum can be tested with the following examples. Each scenario provides a set of basic facts and then considers various permutations based on those facts. It then analyses liability according to the formulation in the Consultation Paper and according to the Forum's proposed formulation.

**Scenario 1: Extortion by a minister:** A minister through an agent demands that all bidders agree that the successful bidder will make a payment to him in the event that he awards the contract in their favour. Each bidder agrees, not knowing whether it is the best bidder, or whether it is the only bidder agreeing to bribe, or whether the minister will in fact award the contract corruptly, and not knowing whether the bribe it has offered will be the highest on offer. In each case below, the winning bidder makes the required payment through the agent to the minister.

Some possible permutations

- 1(a) The minister awards the contract to a bidder which is not the best bidder and which has offered the highest bribe.
- 1(b) The minister awards the contract to a bidder which is not the best bidder, and which has not offered the highest bribe.
- 1(c) The minister awards the contract to a bidder which is not the best bidder, which has offered the highest bribe, and which is owned by relatives of the minister.
- 1(d) The minister awards the contract to a bidder which is not the best bidder, which has not offered the highest bribe, and which is owned by relatives of the minister.

- 1(e) The minister awards the contract to the best bidder and which has offered the highest bribe.
- 1(f) The minister awards the contract to the best bidder, which has not offered the highest bribe.
- 1(g) The minister awards the contract to the best bidder, which has not offered the highest bribe, but which is owned by relatives of the minister.
- 1(h) The minister awards the contract to the best bidder, because he has heard that there is to be a crackdown on corruption and he fears detection.

**Analysis:** Under the Forum's proposed formulation, all bidders, the agent and the minister would be equally guilty of bribery in all of scenarios 1(a) – 1(h). However, under the formulation in the Consultation Paper, the bidders would be guilty as principal offenders in 1(a) – 1(h) but only if the primary reason test is satisfied, and the agent and minister would probably be liable as principal offender only in 1(a). In 1(b) – 1(h), the minister and agent would probably be liable only as accessory because the primary reason test could not be satisfied (either because there was no improper act or because it could not be shown that the bribe was the primary reason for the improper act).

**Scenario 2: The silent minister:** Company X is bidding for a contract. A director of Company X meets with the minister responsible for awarding the contract. During discussion, the director states that Company X would be willing to pay the minister to ensure that Company X wins the contract. The minister says nothing. The director leaves a suitcase of cash with the minister. The minister keeps the money.

Some possible permutations

- 2(a) The minister awards the contract to Company X. Company X is not the best bidder.
- 2(b) The minister awards the contract to Company X. Company X is the best bidder.
- 2(c) The minister does not award the contract to Company X. The project is aborted for lack of funds.
- 2(d) The minister does not award the contract to Company X. He awards it to the best bidder.
- 2(e) The minister does not award the contract to Company X. He awards it to another bidder which is owned by family relatives.

**Analysis:** Under the Forum's proposed formulation, the company director and the minister would be equally guilty of bribery in all of scenarios 2(a) – 2(e). However, under the formulation in the Consultation Paper, whilst the director would be liable as principal offender in all of 2(a) – 2(e) (provided that the primary reason test could be satisfied), the minister would probably be liable as principal offender only in 2(a). In 2(b) to 2(d), there is no improper act and the minister has not necessarily shown any willingness to perform an improper act (so the conduct element for R is missing). In 2(e), there is an improper act but there is no nexus between the bribe and the improper act. Consequently, although the minister had clearly accepted the money knowing it had been given as a bribe, he would probably not be liable at all in relation to 2(b) to 2(e) under the formulation in the Consultation Paper.

**Scenario 3: Agent's commission:** Company X is bidding for a contract. A director of Company X appoints an agent to represent Company X in the territory in which the project is taking place to help Company X win the contract. The agent intends to pay a bribe as a sweetener to the relevant minister to try to influence him to award the contract. The minister has asked for this sweetener. The agent asks the director of Company X for payment of a commission to be paid after contract award and out of the first contract payment. The director agrees. The director and the agent are both aware that the chances of Company X winning are strong because one of Company X's shareholders is the wife of the minister. Due to financial difficulties, Company X withdraws from the tender before the contract is awarded.

Some possible permutations

- 3(a) The agent had told the director that the commission was to be used to bribe the minister.
- 3(b) The director had not been told, but suspected that the commission was to be used to bribe the minister because the commission required was disproportionate to the legitimate services to be provided by the agent. The director was therefore “wilfully blind”.
- 3(c) The director did not know or suspect that the commission was to be used to bribe the minister because the commission was not large, and the company had taken reasonable steps to ensure that there would be no corruption in relation to the award.

**Analysis:** Under the Forum’s proposed formulation, the agent and the minister would be guilty in 3(a), 3(b) and 3(c). The director would be guilty in 3(a) and 3(b), but not in 3(c). Under the formulation in the Consultation Paper, it would be difficult to establish the director’s guilt in 3(a) and 3(b) because of the difficulty in showing that he intended that the bribe should be the primary reason for the minister awarding the contract to Company X (or even that he foresaw a serious risk of this). The director would not be guilty in 3(c). Again due to the difficulty in satisfying the primary reason test, it would be difficult to establish the agent’s guilt in 3(a), 3(b) or 3(c). The minister could only be liable as an accessory (because there has been no improper act). However, if neither the director nor the agent can be shown to be guilty, then there will be no principal offence, in which case the minister cannot be liable at all. This could mean that no one would be guilty under the formulation in the Consultation Paper.

**Scenario 4: Company provides a post-award gift:** Following the award of a contract by a minister to Company X, the director of Company X arranges for the company to pay for the minister and his family to take an expensive holiday. There is no evidence of any prior corrupt arrangement between the minister and Company X.

Some possible permutations

- 4(a) Company X was not the best bidder.
- 4(b) Company X was the best bidder.

**Analysis:** Under the Forum’s proposed formulation, the company director would be guilty of bribery in relation to scenario 4(a) unless he can establish that he did not intend the holiday to be a reward for the minister’s improper act, and the minister would be liable unless he could establish that he did not know or believe that the holiday was a reward for his improper act. The reversal of the burden of proof suggested by the Forum on proof of the conferring of an advantage would apply in this case. There would be no liability for either the company director or minister in relation to 4(b). Under the formulation in the Consultation Paper, it would be difficult to establish the guilty of either the director or the minister in 4(a) because of the difficulty in satisfying the primary reason test. Also the minister would not be liable as accessory because of the absence of a principal offence (and because paragraph 12.19 does not cater for an advantage received after an improper act).

**Separate offence:** Scenario 4(b) is not caught by either bribery formulation. If it is considered that this sort of activity should be criminalized in relation to public officials, then it may be necessary to have a separate offence in relation to the receipt by a public official of an undue advantage.

The above examples cover some of the most common forms of bribery. Under the Forum’s proposed formulation, liability is based simply on the soliciting, paying or receipt of a bribe, with the requisite knowledge or intention. In each case, this ensures an equitable result, namely, the recipient of a bribe is liable to the same extent as the payer, regardless of whether an improper act takes place. In most cases, it would be relatively simple to establish the requisite intention or knowledge, and in more difficult cases this would be assisted by the rebuttable presumption. On the other hand, if the formulation in the Consultation Paper were to apply, it is possible that some or all of the parties may escape liability if:

- the contract was never awarded so that an improper act did not take place; (conduct of R)

- R did not represent a willingness to perform an improper act; (conduct of R)
- the advantage could not be shown to be to be the primary reason for the award of contract; (fault of R)
- there was no nexus between the improper act and the advantage conferred; (fault of R)
- it could not be shown that P intended that the advantage should be the primary reason for R's improper act (or foreseeing a serious risk of this); (fault of P)
- there is no principal offence in which case R cannot be liable even as accessory.

25. **Testing the alternative formulation using the Commission's Examples:** Taking the Commission's own Examples, the following would be the liability for bribery based on the Forum's proposed formulation:

- **Example 6A:** No liability for bribery
- **Example 6B:** No liability for bribery
- **Example 6C:** P and R guilty of bribery
- **Example 6D:** P and R guilty of bribery
- **Example 6E:** P and R guilty of bribery (Insufficient facts re X)
- **Example 6F:** Insufficient facts to establish guilt on any formulation of the offence, (P and R would be guilty of bribery only if the requisite intention/knowledge could be established.)
- **Example 6G:** P and R guilty of bribery
- **Example 6H:** No liability for bribery (Re the other facts in paragraph 6.72, no liability unless intention by P is established.)
- **Example 6J:** No liability for bribery (unless intention by P is established)
- **Example 6K:** P guilty of bribery. (Insufficient facts re R.)
- **Example 6L:** P and R guilty of bribery
- **Example 6.22:** No liability for bribery

The Forum believes that the above results would be fair and would accord with the general understanding of the offence of bribery and the degree of associated culpability.

### **Facilitation payments**

26. The Forum believes that the matter of facilitation payments must be expressly dealt with. There is currently considerable confusion and uncertainty as to liability for facilitation payments and whether or not these constitute bribery or any other offence.
27. The Forum believes that a clear distinction should be made between facilitation payments and bribes:
- (1) **A bribe** should relate to the provision of an advantage for an improper act. This would include, for example, any payment that is made with the intention of inducing a party to give preferred treatment to the payer – for example, by moving the payer up the queue, or awarding a permit which is not due. Such payments are sometimes mistakenly believed to be facilitation payments. Any definition of bribery should be careful to ensure that these types of payments are bribery offences.

- (2) **A facilitation payment** should relate to the provision of an undue advantage to induce a person to perform his duty (i.e. not an improper act), without resulting in preferred treatment. This meaning of facilitation payment will be used in this section.

28. In most cases, a facilitation payment is a minor payment made to a government official in return for issuing a visa, import permit, work permit etc. However, in some cases, facilitation payments may be very significant payments. For example:

- A company may pay a large sum of money to persuade an engineer on a project to certify payment due to the company; or,
- A bidder has been told that it has submitted the best bid, and should win the contract, but it is also told that it must make a payment to persuade the responsible officer to make the correct award.

In both cases, a significant payment is being made to persuade an official to perform his duty, not to breach it. These are facilitation payments. They do not fall within the definition of bribery proposed by the Commission as there would be no improper act as envisaged by paragraph 12.7. Nor would they fall within the alternative formulation of bribery proposed by the Forum in paragraph 18 above. The question is: how should such payments be dealt with by the law?

29. Facilitation payments are both damaging and illegal in many countries, and the Forum wishes to see their elimination. However, the Forum believes that it is important that facilitation payments are dealt with in a reasonable manner. The payer of a facilitation payment is normally considerably less culpable than the recipient. The payer may be the victim of extortion, or may be under considerable personal or commercial pressure, and have no practical option but to make the payment. For example, a company may be forced to make facilitation payments in order to obtain import or work permits to enable it to fulfill contractual obligations, failing which it would incur heavy contractual penalties. Alternatively, tourists or junior employees traveling or working overseas may be compelled to make facilitation payments in difficult circumstances involving traffic police or immigration officials. The act of making a facilitation payment is therefore far less reprehensible than paying a bribe. However, it is nevertheless wrong and should be addressed.

30. The possible options 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 UK, but it is not satisfactory. If there is an offence, it should be prosecuted.
- (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". 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 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 or considerable commercial or personal necessity to have the relevant duty performed with no other means of getting it performed. Circumstances which may affect sentencing could include extortion, commercial or personal necessity, 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 or had no option but to pay.

- (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 (as in (4) above).**

Some examples of how facilitation payments made overseas are dealt with in other jurisdictions are as follows:

- **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. (Section 78dd-1(b) of the Foreign and Corrupt Practices Act 1977) (Section 3(4) of the Corruption of Foreign Public Officials Act 1998).
- **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. (Section 70.4 of the Criminal Code 1995)
- **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. (Section 105C of the Crimes Act 1961)
- **The OECD Convention** does not require the criminalisation of facilitation payments.

31. The Forum's position is as follows:

- (1) There should be a clear distinction between bribery and facilitation payments, as proposed in paragraph 27 above.
- (2) Facilitation payments should be a criminal offence if paid in the UK, regardless of their amount.
- (3) In relation to facilitation payments made overseas, the Forum has been unable to reach a consensus due to the significant difficulties in identifying a fair and effective solution to this issue. Consequently, the Forum does not express a preference in relation to any of the options in paragraph 30.
- (4) 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.
- (5) The payer of a facilitation payment should not be liable for debarment. (See discussion in Section 3 below in relation to debarment.)

#### **Other comments relating to the bribery offence**

32. Paragraphs 12.1 to 12.28 are subject to our comments on bribery and facilitation payments in paragraphs 15 to 31 above.

33. In addition:

- In relation to paragraph 12.5: Subject to its proposals in relation to bribery and facilitation payments, the Forum believes that there should be a separate offence of accepting an advantage in breach of a duty not to accept it. (For an example of this, see Scenario 4 in paragraph 24 above.)
- We agree in principle with paragraphs 12.1, 12.6 to 12.9, 12.13, 12.14, 12.16, 12.20.
- In relation to 12.17, the Forum cannot currently think of a simpler approach.

**Discrete offence of bribing a foreign public official (Paragraphs 12.29 – 12.32)**

34. The Forum comments as follows on paragraphs 12.29 to 12.31:

- (1) Paragraph 7.4 concludes that the general bribery offence may not be adequate to deal with bribery of foreign public officials due to the difficulty in proving “improper act” and that there should, therefore, be a separate offence. The Forum questions this conclusion for the reasons given below.
- (2) There is a risk of confusion and inconsistency in liability in using a definition for bribery of a foreign public official which is different from that of the general bribery offence. This difference is as follows:
  - (a) **The proposed foreign public official bribery offence** relies on an advantage not legitimately due and influencing the performance of a duty.
  - (b) **The proposed general bribery offence** relies on an advantage and influencing an improper act.

For an example of the possible confusion or inconsistency, see paragraphs 37 and 38 below.

- (3) There is difficulty in use of the concept “advantage not legitimately due”. In the Forum’s view, this may be just as or more difficult to prove than an “improper act”. The concept of what is legitimately due may be relative. Does legitimately due mean “official payment”? If so, does that mean that all forms of gift, entertainment and hospitality would be advantages that are not legitimately due? Would the position differ from country to country? This lack of definition may in some cases result in innocent persons being convicted (because the advantage is wrongly seen as not legitimate), and guilty persons escaping liability (because the advantage cannot be proved to be not legitimate). Ironically, if there is no definition of what is legitimately due, then in order to establish that an advantage is not legitimately due, it may be necessary to show that it was given to induce an improper act – in which case, the “improper act” test should have been used in the first instance.
- (4) The Forum believes that the majority of serious bribery cases involving foreign public officials would include an intended “improper act” within the definition of paragraph 12.7. If this definition is shown in practice to be inadequate, then the solution is not to abandon the definition, but to modify it. The Forum believes that any attempt to move away from the critical element of an intended “improper act” will make the bribery law less rather than more effective.
- (5) The Forum does not have a unanimous view on whether there should be a discrete offence for bribery of a foreign public official. Some Forum members are of the view that a separate offence is not necessary and that two offences could lead to confusion and inconsistency. Others are of the view that a separate offence is desirable because this would clearly demonstrate compliance with the OECD Convention and may assist UK companies abroad in demonstrating that they are prohibited by domestic law from bribing foreign officials.
- (6) However, if two separate offences are created, the Forum believes:
  - that these offences should comprise largely the same elements, which should include “improper act”,
  - that prosecution for bribery of foreign public officials should be permitted under either offence, and
  - that this latter point should be made clear in the legislation.

35. In relation to paragraph 12.32, the Forum believes that the proposed offence of bribing a foreign public official should be extended to inculcate the foreign public official who accepts the bribe. Whilst it may be rare that foreign public officials will be tried before an English Court, the Forum sees no reason why the possibility should be excluded. Both the payment and the acceptance of a bribe are regarded as corrupt acts and should be criminalised, as they are for a domestic public official. It is not uncommon 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 be debarred from future contracts, and yet witness the public official using his corrupt assets to shop freely in London.

### **Defences, Barriers to Prosecution, and Ancillary Matters**

#### Defences

36. The Forum agrees with paragraph 12.33. The Forum believes that the common law defences of duress should apply to bribery offences, and also agrees with a limited extension of these defences to include emergencies giving rise to an imminent threat of physical harm which does not constitute a threat of death or serious injury.
37. In relation to paragraph 12.34, the Forum assumes that this is intended to apply only to the offence of bribery of foreign public officials. This is because, where an advantage is conferred in the belief that it was legally required, this would preclude the necessary mental intent to constitute a general bribery offence. (This is an example of the confusion that will arise in having differing definitions for the two offences.)
38. In relation to paragraph 12.35, the Forum does not agree that a defence should extend to cases where the payer conferred an advantage in the reasonable belief that to do so was "legally permissible". This would create a real risk, as the Commission recognises, of a blurring between a belief in legal permissibility of a payment, and a belief in the social or political permissibility of bribery. The Forum's view is that such a blurring is unnecessary and unacceptable. (Again, however, this point would not be in issue if the definition for the general offence applied.)

#### Consent to Prosecution

39. In relation to paragraph 12.36, there is a divergence of view within the UK Forum as to whether consent should be required. Some members share the view of the Joint Committee on the Draft Corruption Bill that consent is required to address a real risk of frivolous and vexatious private prosecutions, and to ensure consistency of decision-making. Others take the view that these risks are over-stated, that there is no need for the requirement of consent, and that enforcement of criminal law should be independent of Government. The UK Anti-Corruption Forum does not therefore express a view in relation to this proposal.
40. In relation to paragraph 12.37, the Forum does not agree that the consent of the Attorney General should be required for any prosecution involving an extra-territorial element (acknowledging that in making this proposal the Commission did not want to pre-judge the outcome of the Government's consultation exercise on the requirement for the Attorney General's consent to the bringing of certain criminal prosecutions). The Forum accepts the conclusions of the Joint Committee on the Draft Corruption Bill that there is no practical need for consent to come from the Attorney General rather than the Director of Public Prosecutions, and that the involvement of the Attorney General (as a politician) risked creating the appearance of bias.
41. Generally, if a consent requirement for bribery offences is to be retained, it is the Forum's view that it should be the consent of the Director of Public Prosecutions and/or the consent of the director of the Serious Fraud Office. The Forum's view is that all decisions should comply with the requirements of Article 5 of the OECD Convention.

#### Ancillary Matters

42. The Forum agrees with paragraphs 12.39 to 12.41. However, it may be advisable to consider retaining the common law offence for a limited period pending assessment of the workability/gaining experience of any new law (as has been done in retaining the offence of conspiracy to defraud in the Fraud Act).

#### Effective internal anti-corruption procedures

43. Whilst not a defence to a criminal prosecution, the Forum does take the view that robust and effective internal anti-corruption procedures should be a mitigating factor in sentencing. It is also a

factor that the Forum believes should be taken into account in relation to debarment from participating in public projects, as discussed further in section 3 below.

### **Corporate Liability**

44. The Forum agrees with paragraphs 12.42 to 12.44. However, if the new law on bribery is to be deferred until 2009/2010, it should deal with the issue of corporate liability.
45. In relation to paragraphs 12.45, there is a specific “consent and connivance” offence in the Fraud Act 2006. The Forum believes that there should be similar specific provision in relation to bribery, and that this should not be left to be governed by the Serious Crime Act 2007.
46. In relation to paragraphs 12.46 to 12.51, the Forum believes that the whole issue of negligent supervision by a legal person should be left to a more general review of the liability of legal persons, as proposed in paragraphs 12.48 and 12.51.

### **Bribery committed outside England and Wales**

#### Principal offenders

47. The Forum agrees with paragraph 12.52.
48. The Forum also considers that the principle set out in paragraph 12.52 should also apply to a company which has a place of business in the UK (even though it may not be registered in the UK).
49. In relation to paragraph 12.53, the Forum believes that an act, which if done in England or Wales, would constitute a bribery offence, should constitute a bribery offence if done outside the UK by a body incorporated under the law of a Crown Dependency or an Overseas Territory.
50. It does not appear that the Law Commission for Scotland has been directly involved in the consultation process. It is therefore not clear whether and when Scottish criminal law on bribery will be brought into line with that of England and Wales. This is not a reason to delay the introduction of legislation in England and Wales.

#### Accessories

51. The Forum agrees with 12.54 to 12.56.

#### Inchoate liability

52. The Forum agrees with paragraphs 12.57 to 12.62.

## **Section 5: Miscellaneous Comments**

### **Debarment**

53. The Forum believes that the Commission should be aware that one of the penalties for bribery is the debarment of companies from participation in public sector projects. There are currently potential material injustices in the way that the debarment law is framed. These comments do not apply to the way that the offence is described, but to the penalty for breach.
54. 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.

55. A copy of the Forum's discussion paper entitled "**Fair and efficient debarment procedures**" is attached as Schedule 1. It should be noted that some forms of debarment are mandatory, requiring a purchasing body to exclude from tendering any company which has been convicted of corruption. The EU Public Sector and Utilities Procurement Directives 2004 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". The EU Directives and consequent UK Regulations govern how public sector and utility contracts are placed. Regulation 23 of the "Public Contracts Regulations 2006" and Regulation 26 of the "Utilities Contracts Regulations 2006" 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.
56. The exclusion (debarment) under EU Directives presently applies however minor the offence, and without regard to any mitigatory factors (e.g. whether the company took steps to prevent the offence, self-reported, co-operated with the authorities, has robust and effective internal anti-corruption procedures etc). It would therefore also apply to conviction for making facilitation payments (as defined in paragraph 27 above).
57. A thorough review of bribery law should consider debarment, and should result in the current law on debarment being replaced with a law which has a fair and proportionate penalty. Further, the Forum takes the view that it would be unduly harsh for a conviction for making a facilitation payment automatically to lead to debarment. It also believes that companies that can demonstrate robust and effective internal anti-corruption procedures should not face mandatory debarment if convicted for an isolated example of bribery.

#### **Other legislation**

58. The Commission's proposals do not consider the Honours (Prevention of Abuses) Act 1925. This Act should be brought within the scope of the consultation. One of the major deficiencies of that Act is that the penalty for bribery is significantly less than under other bribery legislation. The Forum believes that bribery relating to politicians or honours should carry the same penalty as other types of bribery.

#### **UK Anti-Corruption Forum**

**20<sup>th</sup> March 2008**

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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## SCHEDULE 1



### 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 14<sup>th</sup> 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.

## **Transparency**

- 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. Debarment 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 through 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

March 2008

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