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Alert
Anti-Corruption Enforcement

Final guidance published under the Bribery Act 2010: full implementation on 1 July 2011

By Peter King and Steven Tyrrell

The long wait is over. On 30 March 2011, the UK's Ministry of Justice published its final guidance (the "guidance") under the Bribery Act 2010 (the "Act") about procedures which commercial organisations can put into place to prevent bribery. On the same day, the two principal enforcement authorities, the Serious Fraud Office and the Director of Public Prosecutions, published their own guidance to prosecutors (the "prosecution guidance") on how the Act will be enforced. The Act, which has been described as the most draconian piece of anti-corruption legislation in the world, will come into force on 1 July 2011, bringing to an end over five years of legislative activity to reform UK anti-corruption law. The theory will become practice from then on.

The overall structure of the Act and the guidance have been summarised in previous Alerts.[1] This note considers some key issues arising under the final guidance. It also contains, as an Appendix, a summary of the key points in the guidance and the case studies which are part of it.

Status of the guidance

Before turning to specific issues, the status of the new guidance should be explained. The Act creates a strict liability offence (the "corporate offence") for commercial organisations (broadly, all businesses) if a person "associated with" the organisation commits bribery. It is a defence for the organisation to prove that it had "adequate procedures" in place to prevent bribery. The Act mandates the Ministry of Justice to publish guidance on what would constitute "adequate procedures" for this purpose.

The Act does not mandate any other guidance, for example on other controversial issues such as the territorial scope of the Act or the meaning of "associated". However, the guidance in its final form contains a large amount of material which goes far beyond defining what are, and what are not, "adequate procedures". To the extent that the final guidance goes beyond the mandate in the Act, it is not binding on the courts. For example, it would be open to a court to hold that the guidance was wrong in its assessment of the territorial scope of the Act, or that the case studies contained in the guidance are based on a misconception as the law.

In practice, this issue is likely to be more theoretical than real. Prosecutors are highly unlikely to pursue cases based on actions which appear lawful under the guidance, but which they think are nevertheless outlawed by the strict wording of the Act. Faced with a

[1] *Dated 27 September 2010 and 24 March 2010. Copies can be provided on request.*

concerted campaign by business, the Ministry of Justice has taken the opportunity to clarify issues in a way which permits what they see as "normal business" to carry on. This approach has been roundly criticised in some circles: Transparency International, for example, has described the guidance as "a guide on how to evade the Act". Despite this criticism, it seems safe for business to assume that the guidance will be applied as it is written.

Some key issues

Against that background we examine below how the guidance has dealt with some key issues which have been raised by businesses in the long consultation period.

Corporate hospitality and entertainment

The Secretary of State for Justice, Kenneth Clarke MP, is a well-known frequenter of major sports events. It is not surprising, therefore, that his foreword to the guidance contains the sentence:

> *"Rest assured – no one wants to stop firms getting to know their clients by taking them to events such as Wimbledon or the Grand Prix."*

The rest of the guidance is peppered with references to other sporting events, perhaps with the forthcoming London Olympics in mind. Cultural events such as trips to the Royal Opera House are notable by their absence, but the same principles will apply.

Much will depend on the purpose behind the hospitality or entertainment. One example given which falls the right side of the line is a trip to a rugby match "to cement good relations or enhance knowledge in the organisation's field". Elsewhere, however, there are examples the other way, such as provision of a five star holiday for a foreign official unrelated to a demonstration of the organisation's services. Both the guidance and the prosecution guidelines contain similar statements to the effect that the more lavish the hospitality, the greater the inference that it is intended to encourage or reward improper actions by the recipient.

Although Mr Clarke has been anxious to say publicly that he does not want the Act to become a source of work for the compliance industry, the effect of the guidance in this area is that most organisations will find it necessary to adopt new procedures to cover corporate hospitality. One of the case studies attached to the guidance is particularly helpful in this respect – it suggests that businesses should:

- undertake a risk assessment relating to corporate entertainment
- have clear internal guidance on this type of expenditure
- review internal procedures and compliance with them regularly
- train and supervise staff on these procedures.

Facilitation payments

The guidance reiterates the position under the Act, i.e. that there is no exception for facilitation payments. There is a case study on this issue, which suggests some ways in which businesses should respond when faced with demands for facilitation payments. These include:

- clear communication of "zero tolerance" policies to agents in foreign countries
- allowing time to assess whether any demands are permitted by local law
- use of diplomatic channels to put pressure on the country concerned to stamp out the practice of asking for facilitation payments.

The guidance also mentions that genuine duress will be a defence to a charge of bribery (this does not appear in the Act itself but in the common law.

Jurisdiction and extraterritoriality

As pointed out in our previous Alerts, the Act has extraterritorial effect. Jurisdiction over the basic bribery offences extends not just to offences committed in the UK by any person, but also to offences committed outside the UK by UK nationals or residents or corporations or partnerships formed under the law of any part of the UK.

The corporate offence can be committed by UK companies and by companies formed elsewhere which carry on business in the UK. The guidance contains a statement of "the Government's intention" as regards the meaning of this phrase, recognising that this will not bind the courts. The Government expects a "common-sense" approach to be applied, and would not expect the mere fact of a London listing to be enough to found criminal jurisdiction.

The test of "association" – contractors and joint ventures

The corporate offence only applies if a person "associated" with the commercial organisation being charged commits the primary offence of bribery. The definition in the Act is very wide. This has led to concern about various common business relationships, such as that with contractors and joint venture partners. Again the guidance contains interpretive material which is intended to deal with some of these concerns. For example, it states that companies need only be concerned with those contractors with which it has a direct contract, and not with sub-contractors further down the chain. It distinguishes between corporate joint ventures and contractual joint ventures, stating that the "association" test will be easier to satisfy in the latter.

The legal basis for some of these assertions is unclear, but as with other parts of the guidance it is probably safe to rely on them as representing prosecution policy.

Charitable, political and community activities and donations

The guidance contains a case study on this subject which indicates that requests to contribute to charitable, political and community funds may give rise to bribery concerns. The case study suggests that companies should review their policies on these matters and enforce them in the light of the Act and the guidance.

Key points in the guidance

There are now six principles in the guidance:

Principle	Explanation	Comments
1. Proportionate procedures	Procedures should be proportionate to the risks which an organisation faces and the nature, scale and complexity of its activities.	This represents a change from the draft published in 2010 and is to be welcomed. Many commentators[2] suggested the inclusion of this principle. It allows businesses with smaller and less geographically diverse operations to adopt less complex procedures than those operating in risky countries or industries.
2. Top-level commitment	Senior management must be committed to preventing bribery.	This requires engagement by the Board of Directors or similar body. This principle has not been changed since the 2010 draft but now includes examples of what top-level commitment might mean e.g. training of all senior managers.
3. Risk assessment	A requirement to assess bribery risks periodically.	Documented assessments in this area are already undertaken regularly by many businesses. The guidance gives some examples of the sort of risks that should be considered such as country risk, sectoral risk, transaction risk and business opportunity risk.
4. Due diligence	Due diligence on all persons who perform services for the business.	Many businesses already undertake detailed due diligence on their agents, particularly those operating in perceived risky countries. The guidance emphasises that due diligence must embody a risk-based approach and that there is no single approach appropriate to all business relationships.
5. Communication	Appropriate internal and external communication, including training.	The guidance emphasises that effective training is continuous, but is not prescriptive as to how it should be delivered.
6. Monitoring and review	Procedures should be monitored and reviewed regularly and improved where necessary.	The guidance does not require external verification but does suggest that it should be considered.

[2] *including committees on which members of our firm served*

Case studies

At the end of the guidance there are 11 case studies which illustrate its effect. These have no legal force but are indicative of the Ministry of Justice's thinking about best practice and risk assessment. Case study 6, for example, deals with due diligence on agents and suggests that due diligence might include:

- a questionnaire for the agent requesting detailed information on key personnel;
- clear contractual documentation;
- research and internet searches relating to the agent;
- enquiries of local officials in the country where the agent operates;
- periodic review of due diligence results.

It is implicit in the case study that all of the above must be properly documented.

If you would like more information about the Bribery Act 2010 please speak to your regular contact at Weil, or contact:

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