The Bribery Act 2010.
Guidance on adequate procedures published.

A sensible risk-based approach adopted

Following much publicised delay, the Ministry of Justice (“MoJ”) has today published its guidance about procedures commercial organisations can put in place to prevent persons associated with them from committing bribery (the “Guidance”), in accordance with section 9 of the Bribery Act 2010 (the “Act”). The Act will come into force on 1 July 2011, to allow businesses a three month period in which to ensure their policies comply with the Guidance.

The Guidance differs somewhat from the draft first published by the MoJ in September last year and is to be welcomed in providing much needed clarification on specific issues which had been raising considerable concern amongst businesses. Although the Act itself is not watered down, the Government has clearly listened to business concerns and provided some common-sense guidance.

Overview

The Guidance is stated to be of general application, rather than prescriptive or a one-size-fits-all policy. The overriding principle is that businesses should adopt a risk-based approach. Where the risk of corruption faced by a business is minimal, there is no expectation from the Government that complex procedures will need to be put in place. The Guidance confirms that the question of whether the procedures adopted were adequate in the circumstances can only be resolved by the courts, taking into account the facts and matters of the case. However, a departure from the suggested procedures in the Guidance does not, by itself, give rise to a presumption that the procedures are inadequate.

The Guidance is formulated around six key principles. The Guidance states that these principles are not prescriptive but instead are designed to be flexible and outcome focussed, allowing for the huge variety of circumstances in which commercial organisations operate.

> proportionate procedures - procedures which are proportionate to the bribery risks faced by the organisation, and the nature, scale and

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1 The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)
complexity of its activities. This principle is newly expressed and given more prominence in the Guidance than before. The remaining five principles provide guidance on how to implement proportionate procedures;

> **top-level commitment** – placing the responsibility to promote an anti-corruption culture on those at the head of a commercial organisation;

> **risk assessment** – some countries, sectors, transactions and business partners pose more of a risk in corruption terms than others and it will be up to an organisation to assess the risks it itself faces;

> **due diligence** – processes by which risks can be ascertained, prospective counter-parties verified and opportunities researched. Again the investigations that will need to be undertaken will be proportionate to the risks faced;

> **communication (including training)** - to ensure that an organisation's anti-corruption culture is known and understood throughout the organisation; and

> **monitoring and review** – to ensure that a business’s anti-bribery procedures remain appropriate as the business develops or external circumstances change.

The principles are demonstrated in 11 case studies at the end of the Guidance which, although not forming part of the Guidance itself, are intended to assist organisations in determining what might be most appropriate for them when developing their own procedures. The Guidance is at pains to stress that the case studies are not intended to set minimum standards or provide comprehensive advice. The fact that all but one focuses on the bribery risks associated with foreign markets is indicative of the Government’s recognition that such risks are usually higher in overseas territories than at home.

In the rest of this briefing we focus on the aspects of the Act which have been of most concern to businesses and which have been clarified, to a greater or lesser extent, by the Guidance.

**Corporate concerns**

The guidance includes a number of clarifications to deal with concerns from companies and business organisations on the scope of the corporate offence. Of particular interest are the common-sense approach taken to the meaning of carrying on business in the UK and the analysis of whether liability for the corporate offence can accrue through simple corporate ownership or investment.

**Carrying on business in the UK**

The Guidance applies a common-sense approach to the question of whether a non-UK company can be regarded as carrying on business or part of a business in the UK and is thus a relevant commercial organisation capable of
committing the corporate offence. The Guidance anticipates that this would require a “demonstrable business presence” in the UK (although acknowledges that the question is ultimately one for the courts). More specifically, the Guidance suggests that:

> the mere fact that a company’s securities have been admitted to the Official List and to trading on the London Stock Exchange would not, in itself, qualify that company as carrying on business or part of a business in the UK. This should be of some comfort to non-UK issuers who have GDRs or other securities listed on the London Stock Exchange;

> having a UK subsidiary would not, in itself, mean that a non-UK parent company is carrying on business in the UK, since a subsidiary may act independently of its parent or other group companies.

**Associated persons**

The Guidance confirms that the definition of “associated person” (essentially, a person performing services for a relevant commercial organisation) is broad and intended to embrace “the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf”. This is to be determined by all relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The Guidance includes some helpful analysis as to whether suppliers, contractors and joint ventures fall within the definition.

**Suppliers and contractors**

- Contractors could be associated persons to the extent they perform services for and on behalf of the organisation. Where a supplier performs services for an organisation, it may also be an associated person. However, someone who is simply supplying goods is unlikely to fall within the definition.

- In relation to supply chains or a project involving a number of subcontractors, the Guidance takes a contract by contract approach, recognising that an organisation is likely only to exercise control over its immediate contractual counterparty. Persons who contract with that counterparty should be viewed as performing services for the counterparty and not for the organisation or other persons in the chain. That said, to mitigate bribery risks in a supply chain, the Guidance recommends that the organisation should use anti-bribery procedures (such as due diligence procedures and anti-bribery terms and conditions) in the relationship with its contractual counterparty and should request that the counterparty adopt a similar approach with the next party in the chain.

**Joint ventures**

- For joint ventures involving a separate entity (a “JV Co”), a bribe paid by one of the employees or agents on behalf of the

Someone who is simply supplying goods is unlikely to be an “associated person”.

Indirectly benefiting from a bribe through an investment is unlikely to trigger liability.
JV Co should not trigger liability for the members of the JV Co simply by virtue of the members benefiting indirectly from the bribe through their investment in the JV Co. Liability depends on the JV Co performing services for the member and the bribe being paid with the intention of benefiting that member.

- For contractual joint ventures, the degree of control that a participant has over a JV arrangement is one of the relevant circumstances likely to be taken into account to decide whether a person who paid a bribe in the conduct of the JV business was performing services on behalf of a participant in the arrangement. Therefore, an employee of one participant who had paid a bribe in order to benefit his employer would, ordinarily, be presumed to be performing services on behalf of his employer and not all the other participants in the joint venture.

**Liability through corporate ownership**

- Even if there is a person performing services for an organisation, the Guidance stresses that liability will only accrue if the payer of the bribe intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe, e.g. through an investment or through receipt of dividends or a loan from a subsidiary, will be unlikely, in itself, to amount to proof of the intention required for the offence. Thus a bribe on behalf of a subsidiary by one of its employees will not automatically involve liability for the parent company or the other subsidiaries of the parent company.

- This analysis should be helpful for investors concerned about liability for bribes that take place further down the corporate chain.

**Facilitation Payments**

While emphasising that facilitation payments remain illegal under the Act, the Guidance acknowledges that their total eradication is a long term objective requiring progress and a sustained commitment to the rule of law in those countries where the practice is most prevalent. To assist businesses to avoid situations in which they might have to make facilitation payments, the Guidance suggests a number of procedures, such as:

- seeking local advice on the law relating to properly payable fees and disguised requests for facilitation payments;
- training local staff about resisting demands for such payments, as well as the consequences under the Act of making them;
- questioning the authority of those demanding such payments;
- asking to confirm with superiors;
and requiring receipts for any payments made.

While prosecutorial discretion may mean that run of the mill facilitation payments will not be prosecuted, given the Government’s (and OECD’s) anti-facilitation payment policy, a failure to seek to combat the practice may allow a regulator to make adverse inferences about an organisation’s compliance culture.

In very serious cases, where a failure to make a payment may be a matter of life, limb or liberty, the Guidance recognises that the defence of duress is very likely to be available to any bribery charge. Where payments are made, full records should be kept and full disclosure made to regulators where necessary.

**Hospitality and gifts**

Bona fide reasonable and proportionate corporate hospitality and promotional or other business expenditure, intended to promote the image of a commercial organisation, or to market or present its products or services, is perfectly legitimate under the Act. The Guidance recognises that such expenditure plays an important role in commercial relations, both in the private and the public sphere.

**The private sector**

> With regard to private corporate hospitality, such as an invitation to clients to a rugby international at Twickenham, the Guidance makes it clear that this is highly unlikely to be considered bribery unless the intention was to influence someone to perform his or her relevant function improperly.

**The public sector**

> With regard to gifts or hospitality given to foreign public officials (“FPOs”), which is when the risk of conduct falling foul of the Act is considered to be greatest, an offence would only be committed where it was intended that the advantage conferred on the FPO (or another person at his request) would influence him in his decision-making process. Generally, the greater and more lavish the hospitality or gift, the greater is the inference that it was intended to influence. A trip for relevant FPOs to distant mining installations, to verify the organisation’s safety requirements, will fall outside the scope of the Act. However, an all-expenses-paid trip to a five star hotel for an FPO and his partner to a destination unrelated to the organisation’s activities is more likely to give rise to the inference that the trip was intended to influence.

> The Guidance stresses the need to determine what is actually permissible in the foreign country. For example, it is common practice for governments to permit or require those tendering for a contract for publically funded work to offer some kind of additional investment of benefit to the local community. Where the local written law is silent on the point, whether such conduct amounts to a bribe under the Act may...
again fall to be determined by UK prosecutors, in the public interest. In addition, the standards or norms applying in a particular sector may also be relevant when considering whether particular expenditure is permissible.

Prosecutorial discretion

We have noted several instances above where, whether conduct which would amount to an offence under the Act is actually prosecuted, may be left to the discretion of the prosecuting bodies, the Serious Fraud Office and Director of Public Prosecutions. However, the Guidance notes that for a prosecution to be brought not only must there be sufficient evidence but it must also be in the public interest. The more serious the offence, the more likely it is that a prosecution will be considered appropriate. However, cases of facilitation payments, hospitality and promotional expenditure which on their face engage the Act, may nonetheless avoid prosecution where it is not considered in the public interest to take the issue further. Obviously companies should not see this flexibility as a safety net, and it would be unwise to rely on the public interest to protect against prosecution in these circumstances.

Comment

Overall, the Guidance is to be welcomed. It is more clearly and helpfully drafted than the draft put out to consultation. It provides clarification on a number of outstanding areas of concern and will provide more proportionate solution for many companies. Inevitably, each case will turn on its own facts and much will be left to prosecutorial discretion. However, it is to be hoped that the (repeated) references to a prosecution needing to be in the public interest will ensure that only serious or sustained breaches will come before the courts. Much may depend on the attitude of the Serious Fraud Office – certainly its activities will be watched closely.

Other resources on anti-corruption law and enforcement can be found on our website. Please click here.