



Ministry of Justice

**Guidance about commercial organisations preventing
bribery (section 9 of the Bribery Act 2010)**

Consultation document

response from BT

November 2010

General Comments

1. The principles set out in the guidance are helpful to commercial organisations in understanding the purpose behind the requirement for adequate procedures.
2. Section 9 of the Bribery Act states that the Secretary of State must publish guidance about procedures that commercial organisations can put in place to prevent persons associated with them from engaging in bribery as it is set out in Section 7(1) of the Act. The draft guidance, in listing only high-level principles and failing to set out specific procedures, in our opinion has not met the requirements under the Act. It was clearly Parliament's intention that the guidance should specify procedures that companies could adopt that would constitute a defence as set out in Section 7(2). Given that the offence is strict liability and the only defence is to have adequate procedures in place, guidance must be sufficient to enable commercial organisations to determine what would constitute "adequate procedures".
3. The lack of specificity in the guidance has created space for inaccurate advice and conflicting messages. At various seminars, Ministry of Justice and Serious Fraud Office (SFO) personnel have given different interpretations of the Act and the guidance. From the guidance as drafted, it is difficult to determine which interpretations are correct.
4. Given that the Bribery Act imposes criminal sanctions, it is vital that commercial organisations are in a position to assess what is and what is not required of them under the law. The absence of specified procedures or processes in the guidance undermines the ability to do so. A prosecution for failing to implement adequate procedures criminalises failures in management procedures, without requiring any malign or corrupt intent on the part of the commercial organisation. The penalties for such an offence are severe, including debarment from EU public procurement, unlimited fines and incarceration, in addition to the reputational damage associated with prosecution. It is, therefore, imperative that business is able to determine from the outset what acts are and are not illegal, so that it can develop adequate procedures.

Prosecutorial discretion

5. It is a general principle of criminal law that the law must be capable of being understood and that people should be able to determine in advance which acts are and which acts are not criminal. The draft guidance in its heavy reliance on prosecutorial discretion violates this principle. An assurance that prosecutors will act to ensure the fair and just operation of the Act is surely a truism and does not of itself constitute guidance. Commercial organisations must be able to look to the guidance for advice on how to proceed rather than simply hope that their procedures are sufficient to satisfy a prosecutor's discretion. This is particularly so given the different approaches taken by the investigating authorities.

Due Diligence

6. The emphasis upon the third principle, Due Diligence, in the guidance is useful to commercial organisations and has business benefits. However, there are some concerns about the way this has been drafted.
7. In its definition of “associated persons”, the law has been purposefully drafted to highlight the legitimate risk areas around third parties, where one party acts for or on behalf of another, such as in the use of sales agents or consultants. In contrast, the guidance stipulates that commercial organisations should carry out due diligence on suppliers and also the supply chain. As many suppliers simply provide goods or services to an organisation and neither represent that organisation nor seek to obtain or retain business/business advantage for it, we think that they should not fall within the ambit of “associated persons”. Further, at a recent seminar, SFO personnel advised that commercial organisations should complete due diligence on all third parties with whom they have a business relationship. This far exceeds the definition of “associated persons”.
8. In requiring commercial organisations to carry out due diligence on third parties that are not associated persons, the guidance creates a significant compliance burden that is not proportionate to the risk that those third parties pose. It is impractical to require organisations that may utilise thousands of goods suppliers to conduct detailed checking on each of those suppliers.

Hospitality and Promotional Expenditure

9. It is helpful that the guidance takes a pragmatic approach to business gifts and hospitality. However, the guidance should give further examples so that commercial organisations are able to determine what prosecutors may view to be “lavish”. At consultation meetings, Ministry of Justice personnel stated that prosecutors would look at sector norms when evaluating the use of gifts and hospitality. It would be helpful if the guidance specified how such norms would be established, for example it is unlikely that commercial organisations would discuss levels of hospitality with competitors, particularly where such competitors may not be subject to the Act and, if they were to do so, there is a risk that it could amount to a breach of competition law. It would be helpful if this were clarified and included in the guidance so that commercial organisation could rely on this.

Illustrative Scenarios

10. The illustrative scenarios are a helpful addition to the guidance, however, in their current form they are overly complex and risk confusing rather than clarifying the issues. For example, in the first scenario, it is not clear whether the UK company, its subsidiary or a potential third entity are the relevant party in the scenario. The scenarios should be simpler, more realistic and better reflect the principles as set out in the draft guidance. In particular, it is impractical, as in the scenarios, to expect senior management in large organisations to direct the day-to-day operational

decision-making on any given sales bid. For example, in the fourth scenario, it is expected that senior management develop and implement tailored anti-bribery policies for a particular jurisdiction. In large commercial organisations and multinationals, regional management supported by legal/compliance departments are better placed to carry out such functions. The scenarios should make clear that the role of senior management is to set the tone at the top and to ensure sufficient resourcing for and commitment to ethical processes.

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