

BRIBERY ACT – SOME CLARITY AT LAST?

After a long wait, the Ministry of Justice has finally published its official guidance on the UK Bribery Act, which is now due to come into force on 1 July 2011. The official guidance clarifies the ‘full defence’ against the new crime introduced by the Act, namely failure to prevent bribery, and deals at length with the adoption of ‘adequate procedures’, which relevant commercial organisations of all sizes must now put into place. Like the draft guidance published in September 2010, the official guidance is based on six basic principles. That said, however, it should be emphasised that the guidance is not prescriptive and is not a ‘one-size-fits-all’ document. Companies of different sizes naturally face different challenges and, whilst the principles should provide useful policy guidance in the event that a case is prosecuted, all relevant facts and circumstances will be taken into account.

The six principles are:

- 1) proportionate procedures;
- 2) top-level commitment;
- 3) risk assessment;
- 4) due diligence;
- 5) communication (including training);
- 6) monitoring and review.

These principles differ from the draft guidance published last year in that the principles of ‘proportionate procedures’ and ‘communication’ are new.

The principle of proportionate procedures is considered to be the core principle and is a combination of the earlier principles of ‘clear, practical and accessible policies and procedures’ and ‘effective implementation’ that were included in the draft guidance. This principle means that anti-bribery procedures are required to be proportionate to the bribery risk the company faces and, if they meet this test of proportionality, will be considered to be adequate. Creating proportionate procedures will, thus, start with a risk assessment that is linked with the size, nature, country and sector of the company and its business, and also the type and nature of the performance of the associated person. Furthermore, internal factors, such as a bonus culture and a lack of financial control, may add to the level of risk. The company’s anti-bribery policy should address these specific risks in a proportionate manner. Common elements that all companies may want to cover in their policy are the commitment to bribery prevention, a general approach to the mitigation of bribery risks and an overview of its implementation strategy.

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The second newly-introduced principle is communication, which includes training. Organisations should ensure that their anti-bribery policies are clearly communicated internally, as well as externally. What that means is that, internally, the tone from the top will have to provide a clear anti-bribery message. External communication could be produced in the form of statements or codes. The training of staff will need to be proportionate and addressed to specific risks. New employees, agents and also associated persons may also need specific training.

It is also worth mentioning that the official guidance makes clear that proportionate and reasonable bona fide hospitality and promotional activities are considered an important part of doing business and will therefore not be regarded as bribery. Only extraordinary hospitality or excessive gifts that have the ability to influence an improper performance will thus be considered as bribery. However, facilitation payments, which are small bribes paid to facilitate routine government action, are still considered as bribery.

Although still rather vague, the official guidance has provided a little more clarity on the meaning of "adequate procedures" and has made many more companies feel slightly more at ease. This does not mean, however, that companies can now relax, as it is important to be aware of the fact that this is just guidance and a degree of certainty as to what "adequate procedures" actually means will only come after at least one company is found not to have had them in place.

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