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Bribery Act 2010 - Ministry of Justice "Adequate Procedures" Guidance Published

The Ministry of Justice have today published the long awaited finalised guidance on "adequate procedures" under the Bribery Act 2010. The publication of the guidance means that the Act will come into force on 1 July 2011.

The Act created a new criminal corporate offence of failing to prevent bribery by a person associated with it, this includes employees, agents and intermediaries. In order to establish a defence to such a charge, an organisation will need to be able to demonstrate it has adequate anti-bribery procedures in place. The guidance published today is aimed at assisting organisations to understand what will constitute "adequate procedures".

Gifts and Entertainment

Since the Act was drafted, businesses have had serious concerns about its application to corporate gifts and entertainment and when these would be considered to amount to bribery. The guidance carries a clear message that in order for hospitality to be considered bribery, the prosecution will need to show that it was given with the intention of inducing improper conduct from the recipient with regard to their business, trade or profession. In other words, such hospitality and gifts need to be given with the intention of persuading the other party to improperly award business to him. Gifts and hospitality are not criminal if provided simply to improve a relationship and/or network. The guidance states that the government recognises that bona fide hospitality, promotion or expenditure seeking to improve a company's image, present products or establish cordial relations is a legitimate and an important part of doing business. Such behaviour is not intended to be criminalised. The guidance goes on to provide the example of an invitation to foreign clients to attend the six-nations rugby as part of a public relations exercise to cement relations and enhance knowledge of the business. It is clearly stated that this is unlikely to be considered to amount to bribery. It had previously been thought that hospitality of this nature may be caught by the Act. The guidance goes on to state that organisations may wish to review their policies on hospitality and promotion as part of their implementation of anti-bribery prevention measures.

Facilitation Payments

Under the Act facilitation payments remain illegal and the guidance does not seek to minimise this fact.

Associated Persons

The guidance takes into account businesses' fears that they could be liable for persons associated with them, who they cannot control. It refers to a supply chain involving several entities and states that a party is only likely to be liable for acts of its contractual counterparty and not for the activities of sub-contractors further down the chain. The guidance also makes it clear that bribes paid on behalf of a joint venture will not trigger liability for the member simply by virtue of the member benefiting indirectly from the bribe through their investment in, or ownership of, the joint venture.

The guidance states that businesses may wish to use anti-bribery terms and conditions in relationships with contractual counterparties and request that the counterparty adopts a similar approach with any sub-contractors.

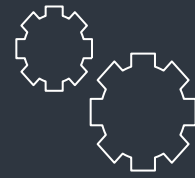
Prosecutorial Discretion

The guidance also states that in cases where bribery does appear to have taken place as a result of hospitality, promotional expenditure or facilitation payments, prosecutors are to carefully consider the public interest before deciding whether to prosecute. The director of the Serious Fraud Office and the director of Public Prosecutions are to issue joint guidance for prosecutors setting out the approach that will be taken when deciding whether to prosecute under the Act.

The Guiding Principles

The guidance remains non prescriptive and indicates that "adequate procedures" should be built around 6 principles outlined below.

1. **Proportionality** - Organisations should take action appropriate to the risks they face and the size of the business.
2. **Top level commitment to bribery prevention** - Senior management must take personal responsibility for the organisation's anti-corruption programme, maintaining oversight of its progress and implementation and the board should regularly consider anti-corruption issues.



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3. **Risk assessment** - Organisations should review and monitor the bribery risks they face in their market, sector and location. If operating in different countries, each country should be assessed individually. Large, high risk operations should consider using external professionals to assist the risk assessment.
4. **Due diligence** - The Bribery Act introduces criminal liability for a company that "fails to prevent bribery" where an "associated person" bribes another person. Companies need to check out agents, intermediaries, joint venture partners and other third parties and ensure adequate due diligence is undertaken on all new business relationships before the appointment of the third party and regularly review these relationships during their lifetime.
5. **Communication** - Anti-bribery policies and procedures need to be integrated and visible throughout organisations. They need to be imbedded in the organisation and understood by employees, intermediaries and agents. Many companies will need to roll out new training on anti-bribery and it is likely that on-line training tools will become common place for larger organisations.
6. **Monitoring and review** - An organisation must be able to prove that it regularly monitors and reviews the adequacy and suitability of policies and procedures and adapts them to reflect any changes in the organisation.

Ensuring the above criteria are properly followed and implemented will assist organisations should they need to prove that they have taken the bribery risk seriously and implemented "adequate procedures" to prevent it occurring. For many companies this will mean new policies, new or improved training throughout the organisation including the introduction of on-line training tools for all employees and intermediaries and a more thorough approach to tackling the risk of bribery in the UK and abroad, all approved at a board level.

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