



The Hundred Group
of Finance Directors

The Bribery Act Implementation Team
Ministry of Justice
7.42, 102 Petty France
London
SW1H 9AJ

9 November 2010

Dear Madam or Sir

Consultation on guidance about commercial organisation preventing bribery (section 9 of the Bribery Act 2010)

We are pleased to submit our comments on the above consultation.

Who we are

The Hundred Group is a non-political, not-for-profit organisation which represents the finance directors of the UK's largest companies, with membership drawn mainly, but not entirely, from the constituents of the FTSE100 Index. Our aim is to contribute positively to the development of UK and International policy and practice on matters that affect our businesses, including taxation, financial reporting, corporate governance and capital market regulation. Whilst this letter expresses the view of The Hundred Group of Finance Directors as a whole, they are not necessarily those of our individual members or their respective employers.

Our views

We welcome the Ministry of Justice's consultation on this guidance and the opportunity to respond on these issues.

We set out our detailed responses to the consultation questions in the Appendix to this letter. Being mindful of our membership we have not sought to address all questions of the consultation, and have focused our response on the impact on large, international corporations.

As international corporations we understand, support and encourage the need for responsible business practices. We take full responsibility for our organisations to undertake commercial operations in an open and transparent manner. We fully endorse the need for the UK to have an internationally recognised standard of behaviour to combat corruption, wherever it may be found and as such we welcome the introduction of the Bribery Act 2010 as a modern, comprehensive replacement for existing legislation.

In general we welcome the approach that the Ministry of Justice has taken in the guidance, providing risk-based principles which can be scaled and adapted to individual corporations and industries. We are appreciative of the adaptive approach taken as compared to a 'one size fits all' document. In our opinion, the principles demonstrate an understanding of the types of risks faced by different organisations, and sets out a clear approach for establishing an anti-bribery and corruption programme which is adaptable, flexible and integral to the commercial functioning of the business.

However, we are of the opinion that further clarity is required in order to ensure that the implementation of the guidance is clearly understood and made practicable.

We are conscious that, for the majority of international businesses, the corporate landscape has changed significantly over the past few years. Increasingly we look to compete at a fully international level – for us, growth nations such as emerging markets are increasingly key to our long term development. In addition, UK businesses are promoting growth and encouraging commercial development within these nations as a result of increased investment. We do not consider that sufficient guidance has been provided around adequate procedures when operating or considering operating, in these regions. We do not believe that it is the intent of the Ministry of Justice to place UK based multinationals in a position of competitive disadvantage, nor to discourage investment in all countries where bribery is socially accepted and overlooked by local legal practices. We believe that in these circumstances a balanced, informed and proactive approach to bribery and corruption is required to ensure that bribery practices, where they exist, are understood, managed and subsequently eradicated as expediently as possible. This would clearly contrast with environments where bribery acts are not socially acceptable, and legal restrictions fully enforced such as within the UK.

We are concerned that the ramifications of not providing a suitable level of clarification could be far reaching. We fully support the need for corrupt business practices to be eradicated, and the need for Boards to act with integrity and demonstrate leadership in all their actions. We know, however, from experience that the absolute removal of all instances of corruption can never be achieved – similar to absolute compliance with any law in society-and the absence of any materiality threshold in the legislation will facilitate this perception. For example, a nominal value of hospitality undertaken with a potential customer ahead of an order being taken could be deemed currently to fall foul of the Act, despite its innocuous nature. The ability to draw a balanced and pragmatic position through the guidance will provide the difference between creating a leading edge approach to corporate governance and engendering a culture of concealing instances of corruption where they occur. We believe that Board members should be in a position to welcome the Bribery Act as a robust and clear backbone to their anti-Bribery policies. Without further clarity we are concerned that, to the contrary, Board members will be put in a difficult if not impossible position with limited guidance over transitional arrangements and a need to embed legislation with no formal guidelines for how to deal with these, unfortunately, inevitable instances as they occur.

In our detailed answers we draw out some comments on the Illustrative Scenarios provided within the guidance. In our opinion these Scenarios would be strengthened through some clearer, practical scenarios which would assist in the real time decision making of management. We support the efforts of the GC100 in preparing some alternative Illustrative Scenarios and urge the Ministry of Justice to consider inclusion of these scenarios.

Yours sincerely



Peter Williams

Chairman, The Hundred Group – Investor Relations and Markets Committee

Appendix

Question 1: Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so, what are they and why do you think they are important?

We consider the principles to be clear and helpful.

We note, however that adherence to the guidance is not to be viewed as a defence under the Bribery Act, nor that it should be considered as a comprehensive list of considerations to be undertaken by management. Whilst we understand that the guidance is designed to be exactly that – guidance, not rules – we would appreciate further clarity that, in the majority of situations, adherence to the principles is an appropriate starting point for preparers when considering their anti-bribery procedures.

In addition we note that paragraph 7 on page 4 of the consultation states that ‘the guidance...[does] not replace or supersede other forms of bribery prevention guidance published by industry or sector representative bodies or by non-governmental organisations...Organisations must continue to comply with sector-specific regulations and standards at all times.’ In our opinion the guidance published by the Ministry of Justice should, and will in practice, be given greater weight than other guidance which will not have any statutory footing and is unlikely to be based on the extensive consultation and thorough process that will underlie the Ministry of Justice guidance. We consider that it would be appropriate for the purposes of the section 7 offence for the Ministry of Justice guidance to take precedence, whilst of course acknowledging that the guidance is not prescriptive and that in the context of any particular prosecution the courts will take into account all factors it considers relevant.

With respect to the individual principles we note the following:

1. Principle 2: Top Level Commitment – Involvement of the Board

The guidance is drafted with consideration for the level of involvement from the Board, which we fully support.

However, in the Illustrative Scenarios there is repeated reference to ‘top-level management’ involvement in decision making processes. We are of the opinion that ‘top-level management’ should not necessarily refer to the Board, but be a flexible reflection of the decision making management for the particular transaction. To consider that senior level management at a Group wide definition are involved in all decisions made, from individual hospitality to contract negotiations, would be neither accurate nor practicable. However, senior management should, and do, set the tone for further decisions to be made.

We consider that further clarification should be made with this regard.

2. Principle 3: Due Diligence - Business Partners

The Bribery Act identifies that a business is liable for failure to prevent bribery by a ‘person who performs services on its behalf’. The guidance then goes on to indicate that this is only the case where a business has ‘effective control’ over the service provider. In our opinion there is currently a lack of clarity around the definition of ‘effective control’. The confusion that this can cause is demonstrated in the treatment of business partners in the draft guidance.

We consider that the current discussion of 'business partners' within this principle is currently open to very broad interpretation. Whilst we believe it appropriate that our anti-bribery policies are broad reaching we would not support taking on responsibility for anti-bribery and corruption policies for all our intermediaries, consortium, joint venture partners, contractors and suppliers, nor do we consider it appropriate. We would support a risk-based approach to these arrangements which take in to account the level of ownership and influences held by the entity, the size / materiality to the contracting entity and the risks involved in the specific area of concern. In our opinion, acknowledgement of a pragmatic and responsible approach would strengthen the guidelines in this area.

3. Principle 4: Clear, Practical and Accessible Policies and Procedures – Policy Documentation

We note that the current guidance describes a Policy document which includes 'a clear prohibition of all forms of bribery including a strategy for building this prohibition into the decision making processes of the organisation'.

In our opinion this is a very 'black and white' statement which may overlook the behavioural ramifications for operating in an international environment. Whilst we fully support a policy which categorically states that the Board condemns all forms of Bribery we are concerned with how this could translate in to practical scenarios. We understand that currently, in some parts of the world, facilitation payments or small, local bribes occur. Our strong preference is that we, as responsible investors in some of these areas, understand this position and openly collate, log and monitor any such payments, that we establish longer term projects to reduce and eliminate such payments and help build local relationships to this effect. In our view, this is preferable to an outright prohibition which could force local management to breach company policy.

Within Appendix 2 to this letter we append the current proposals made by the GC100 to be included within the Illustrative Scenarios. We are of the view that the 'Facilitations Payments Case Study' eloquently deals with this practical aspect of conducting business on an international platform.

4. Principle 6: Monitoring and Review - Disclosure

We note the comments under Principle 6 that the 'Board...may wish to make an independent assessment of the adequacy of anti-bribery policies and disclose their findings and recommendations for improvement in the organisation's Annual Report to shareholders'. We do not consider the Adequate Procedures guidelines an appropriate medium to provide additional requirements or guidance over information included within the Annual Report. Current disclosure requirements over the responsibility of the Board and Audit Committee should provide sufficient breadth for management when considering Annual Report disclosure.

Question 2: Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?

Please see above.

Question 3: Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?

Illustrative Scenarios

We consider that the inclusion of illustrative scenarios is a helpful addition to the current guidance and that the scenarios cover the areas of greatest risk for businesses. We also agree that it is important to recognise that there may be a range of procedures which different business undertake, depending on their particular business model.

However we consider that the current scenarios are limited in their usefulness. In particular, we note that the scenarios are retrospective in consideration, proceed on the basis that the organisation's procedures are poor and that a bribe is paid. Moreover, they provide limited guidance on adequate procedures and what may or may not be appropriate mitigating steps to take for dealing with such scenarios.

We note that the GC100 has previously provided the Ministry of Justice with some alternative scenarios which we would support for inclusion within the guidance. In particular we feel that this provides appropriate guidance and forward looking scenarios, in particular a helpful approach to facilitation payments. We include these in Appendix 2 for reference.

Appendix 2: GC100 Alternative Illustrative Scenarios

SUPPLIERS CASE STUDY

Company A, a seller of oil and gas, is in the process of bidding for the rights to develop infrastructure for oil discoveries in country U. As part of the tender process, the government of country U has specified that bidders must demonstrate that they will use suppliers based in country U wherever possible in the project.

Company A will need to sub-contract for steel fabrication work if it wins the tender. The regional manager with responsibility for country U and the surrounding states has looked into possible suppliers in country U and has identified three possible candidates. All are keen to be part of company A's bid and each makes an approach to the regional manager to establish their credentials. In the course of this process two of the local companies invite the regional manager to sporting events while the third emphasises its track record in working closely with the government of country U in major projects.

In these circumstances, the following will be relevant considerations for company A:

- Clear and practical policies and procedures governing the selection of suppliers and sub-contractors.
- Written guidelines for staff on the acceptance of corporate hospitality and gifts, particularly in the period before the award of a contract, and the recording of these where appropriate.
- A designated person tasked with implementation of company A's bribery free business regime in this region, to monitor the tender process for bribery risk.
- A reasonable level of due diligence, proportional to the perceived risk of bribery in country U, on the potential suppliers, covering:
 - their reputation and any previous allegations of corrupt conduct;
 - connections with public officials or others involved in the tender process; and
 - specific enquiries of the supplier emphasising its close working relationship with the government of country U to ensure that nothing inappropriate is implied in this.
- Confirmation from the potential suppliers that they have in place their own clear policies on corruption.

JOINT VENTURE CASE STUDY

Company B is a producer of slate tiles, which is interested in the significant slate resources in country V. Given that it is not familiar with the market, B has decided that it needs a local partner in country V. The project team has visited country V and identified a few potential joint venture partners. The process is not altogether straightforward though as there are some language difficulties and a lack of clarity in relation to the regulations dealing with employment, tax, company registration and foreign exchange issues for remitting revenues out of the country.

The project team is getting different messages from the shortlisted possible business partners on how easily those regulations may be dealt with. There are also a number of structures that would be possible for the joint venture vehicle in country V. Given these complexities and the inevitable interaction with local government officials that is required, the project team have some concerns on what may go on in country V.

In these circumstances, the following will be relevant considerations for company B:

- A risk based due diligence on the activities of the potential business partners, as for suppliers and sub-contractors (see *Suppliers Case Study*).
- The level of control of the joint venture by company B will determine the extent of its ability to implement anti-bribery policies and controls:
 - If company B is a minority shareholder in a locally registered company, it may be limited in the extent to which it can influence the joint venture company's policies and processes. B may therefore need to consider what steps it can take to be satisfied of the integrity of the members of the board of the joint venture company. Depending upon the circumstances, B may be able to propose that anti-corruption policies be adopted by the joint venture. B should ensure that it is able to exit the relationship if it becomes concerned as to the joint venture's conduct.
 - If company B has a controlling interest in a joint venture company it will be in a stronger position to impose its own policies and procedures for dealing with government officials in connection with the obtaining of regulatory permits and other possible corruption risks.
 - The joint venture may be established through a contract with no separate company being formed. In this case, depending upon the size of each party's interests in the arrangement and their respective bargaining position, it may be appropriate to agree how issues of corruption are going to be dealt with by the joint venture parties, each of whom may have different internal policies and processes.

CHARITABLE DONATIONS CASE STUDY

Company C exports a range of seed products to growers around the globe. Its representative, S, travels to country W to discuss with a local farming co-operative the possible supply of a new strain of wheat that is resistant to a disease which recently swept the region.

In the meeting, the head of the co-operative tells S about the problems which the relative unavailability of antiretroviral drugs cause locally in the face of a high HIV infection rate. In line with C's strong commitment to social investment, in a subsequent meeting with the aides to country W's agriculture minister – who will ultimately be responsible for approving C's new wheat strain for import – S suggests that C could provide funding for the necessary medication. The aides welcome this and suggest that C might provide the drugs via a particular domestic NGO.

In these circumstances, the following will be relevant considerations for company C:

- While in principle giving money or goods to charity in this way is not problematic, ensuring that such donations are made in a transparent and open manner and do not raise any expectation of the award of a contract.
- Policies and procedures governing the selection of charitable projects or initiatives informed by appropriate risk assessments that identify specific risks relating to the making of charitable donations in different countries.
- Training and support for staff in implementing the relevant policies, and channels of communication which allow issues to be reported and compliance to be monitored.
- Consulting with staff members and any business partners it has in country W to obtain useful intelligence on the working practices of local charities and NGOs.
- Making reasonable efforts to conduct due diligence on all potential charity partners to assess their reputation and attempt to identify, if possible, any connections to government officials.
- If charitable donations made in country W are routinely channelled through government officials, a red flag should be raised and C may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official off-set arrangements with the government.

ADVISERS CASE STUDY

Company D is intending to bid for a contract with country X to build a bridge there. Country X is a new market for D and, as is customary practice in this jurisdiction, it wishes to enlist the services of a local adviser to assist in the bidding process. Individual Q offers to act as D's local adviser in return for 5% of the bid contract price in the event that D's bid is successful. Q says that he could cover all marketing costs on the project, that he has great experience in the bid process and of the personalities involved, and that he has an unrivalled track record in bids of this type.

In these circumstances, the following will be relevant considerations for company D:

- Clear and practical policies and procedures governing the appointment of marketing advisers. These should include a rigorous due diligence and approvals process.
- Due diligence on the potential adviser and any associated companies, covering his reputation, any previous allegations of corrupt conduct, and his connections with public officials or others involved in the tender process.
- Due diligence on local law on bribery issues and whether country X is perceived to be a place where bribery is particularly prevalent.
- Depending on the risks identified, some of the precautions D might consider are:
 - ensuring fees are proportionate to the work performed, by negotiating a fixed retainer or other arrangement such as hourly rates, tied to an agreed scope of work, rather than the bid outcome;
 - insisting upon transparency and regular monitoring of the work performed by Q;
 - requiring termination provisions in its contract with Q, making it easier for company D to exit the relationship, if Q is found to be engaged in improper conduct; and
 - requiring Q not only to make assurances that he will comply with all applicable anti-bribery legislation, but also to demonstrate the anti-bribery procedures within his own business.

HOSPITALITY CASE STUDY

E has developed specialist equipment but, due to concerns regarding commercial secrecy, E will only demonstrate its equipment at its headquarters in the UK. E has adopted a policy of paying the reasonable travelling and accommodation expenses of potential clients who wish to visit the UK and view a demonstration.

Y is the Governor of a province in a country with a need for equipment such as that produced by E. He is intending to visit the UK in the near future. Y intends his visit to combine diplomatic and commercial interests. He wishes to view a demonstration of E's equipment with a view to a potential purchase. He also intends to visit his son who is at University in the UK.

Y submits his travel plans to E, which believes that not to bear the expenses of Y's visit would be extremely embarrassing and could be commercially detrimental to E.

In these circumstances, the following will be relevant considerations for company E:

- Communicating to Y in advance that, while offering hospitality is acceptable in the UK, there are legal restrictions which apply to the provision of hospitality where its extent could lead to the perception that it would be likely to affect the outcome of business transactions;
- Policies giving practical examples of where the nature and extent of the hospitality might be problematic, for example, the extent of the stay, its purpose beyond business, the involvement of family members, or a high level of expense likely to be incurred combined with clear advantages to be obtained by Y;
- For reasons of transparency and to facilitate monitoring, maintaining a register of any benefit or hospitality offered by any member of E's staff. The value of both benefits obtained and expenditure incurred should be assessed accurately and correctly accounted.
- Maintenance of sufficient records to enable E to demonstrate that expenses were necessary, reasonable and proportionate to enable E to adequately demonstrate its equipment and that the obtaining of an advantage by Y was not the principle motivating factor in the provision of hospitality and entertainment.

FACILITATION PAYMENTS CASE STUDY

F is an exporter of perishable food products. It charters a vessel to deliver its product to country Z. All vessels must be inspected and certified by a government inspector upon arrival. A fee of US\$2,000 is payable for each inspection. A certificate of inspection is required before any cargo may be unloaded. F's vessel is initially inspected and the results are said to be inconclusive, so a further fee is paid for another sample to be taken. The inspector indicates that the results are borderline and that the vessel must be inspected every day it remains in port. It will take at least a week to unload the vessel. A challenge to the decision of the inspector will take at least a month to be heard by the court in Z. A decision is taken by F's employee to unload the vessel. An inspection fee is paid for every day the vessel remains in port. It is possible that the inspections were excessive and that their repetition was designed to levy as high a fee as possible.

In these circumstances, the following will be relevant considerations for company F:

- Guidance and training for employees to enable them to identify circumstances that may amount to a prohibited facilitation payment and how to handle such situations when they arise, particularly where there is any threat to their safety or the safety of family or colleagues.
- A policy regarding the escalation of such issues within F to a person of sufficient seniority with an understanding of the legal restrictions.
- Financial controls which ensure that receipts are obtained for all payments and that these are properly recorded in F's accounts.
- A policy of taking further steps to minimise the prospect of payments being requested which may, for example, involve initiating a complaint with the police or judicial authorities in Z or, if this is unlikely to be effective, reporting the payments to the UK consular office in Z and possibly to industry representative organisations.