ELA WORKING PARTY

CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010)

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of David Widdowson of Bevan Brittan to consider and comment on the consultation document "Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)". Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

ELA's Response

The consultation document seeks replies to a number of questions. We offer some comments in relation to these and also on each of the Principles together with some additional points which are within our remit and which we hope will be helpful.

Question 1

We consider that the six Principles are a helpful framework to enable organisations to address the risk of bribery effectively. We do not identify any additional principles although the issue of acquiring information prospectively to assess risk, the process of maintaining and reviewing that and then recording and learning from experiences, whilst covered across the existing principles could form a principle of its own.

Question 2

The Guidance does not contain much in the way of procedures as such, rather suggestions as to considerations to have in mind and actions that might be taken. As a general observation we consider that that is a shortcoming in the Guidance. Some positive statements as to how, for example, an organisation might deal with the issue of hospitality or the process by which due diligence on commencing business in a particular company would be valuable guidance, particularly for smaller organisations who are at the developments stage of doing business outside the UK. The same might be said, for example, in relation to the need to get professional advice in relation to laws of foreign countries which permit or require public officials to be influenced by advantage under section 6 of the Act. The OECD guidance to which the consultation document refers is in more prescriptive terms and perhaps as such offers more practical guidance.

Question 3

The sequence of the principles is helpful and provides a useful framework for organisations to follow. The Illustrative Scenarios, whilst not apparently forming part of the Guidance, are very

complicated and relevant to larger companies familiar with doing business abroad. ELA believes that these could be more varied so that they are relevant to a wider range of organisations.

On a presentational note it may be helpful to place the section presently entitled “Further Information About the Act” at the beginning so that the Principles are then seen clearly in context.

Question 4

Generally the terms of the Guidance are focussed more on larger companies and on the foreign elements of the Act – see our comments on the Illustrative Scenarios above. Although we do not consider the Principles need amendment or addition for this group, we do believe that the examples quoted in relation to each Principle could be reviewed to make them more relevant to them. We comment in more detail in relation to each below,

Question 5

See above and our specific comments in relation to the Principles.

Further Comments

We have a number of further comments, both general and specific to each of the Principles, which we trust will be helpful to finalising the Guidance

General

We appreciate that the Guidance Document must be flexible enough to cover a wide range of situations and organisations and so not be too prescriptive. Whilst we generally endorse the aim of producing a principles based Guidance document (and the Consultation Paper generally achieves this), nevertheless we think that the Guidance should provide more practically focussed assistance on the range of actions which employers should take (or at least consider taking) to review and monitor their anti-bribery measures.

One of the complicating factors is the requirement under s7 for an organisation seeking to make out a defence where bribery has taken place to be able to point to “adequate” procedures it has in place. Were the term used to have been “reasonable” then that would have the potential to apply a differing standard according to the size and resources of the organisation concerned.

What is meant by “adequate”? It would seem to imply a more rigid standard applicable to all, or at the least without reference to size. It may be that this was a positive intention on the part of the legislature but it seems likely that, unless this issue is addressed in this Guidance (which we do not consider it is at present), further assistance will need to be provided by the Courts which we would see as undesirable, particularly on an issue as serious and sensitive as bribery. On one view, for example, a procedure in a company to prevent bribery where bribery has in fact taken place is perforce not “adequate”. That cannot be the intention as, if it were, the defence could never be made out.

Some Guidance, therefore, as to how an organisation may structure itself and its procedures so as to have an expectation that it is compliant with the required standard would be helpful. A clear statement for example that being able to demonstrate conscientious application of the Principles should, in the absence of circumstances showing clear deviation from them, enable an organisation to feel confident it will be able to defend itself against a section 7 prosecution.

In addition we believe it should be made clear that smaller organisations do not have the advantage of less rigid compliance with the Principles unless it were to be made expressly clear in the Guidance that Courts would be expected to apply this standard taking into account the size and resources of the organisation.

Connected with this, as noted above, we consider that the Guidance has been drawn up very much with the position of larger companies in mind, or at least those with existing experience in operations in foreign countries. Each of the Illustrative Scenarios, for example, is based on a complex (and difficult to follow) set of scenarios involving a number of different jurisdictions which would be of little relevance to, for example, a small but growing UK based company looking to provide services into the public sector. The issue of hospitality for such an organisation could be highly relevant but the Scenario dealing with this is from a very different world. This might either confuse the smaller company or lead it to believe that these Principles are in some way not applicable to it.

We accept that this is a complex area and that Guidance cannot be comprehensive or so prescriptive as to usurp the functions of the Courts or be misleading when taken out of context. Consideration could be given to adopting a similar facility as is, we understand, available under the US Foreign Corrupt Practices Act whereby an organisation may write in on an anonymous basis to the Ministry of Justice for an opinion on a situation which is then published on the Ministry's website.

Principle 1; Risk Assessment

It would be helpful if the procedures were more prescriptive - for example "the risk assessment should be undertaken by someone who is adequately skilled" as opposed to "organisations should consider whether those undertaking the assessment are adequately skilled." The OECD guidance is more prescriptive. It would also be helpful if there were examples of those who the Ministry of Justice consider to be adequately skilled to undertake a risk assessment – for example a senior corporate officer should be ultimately responsible.

It would be also be helpful if a list of approved publicly available information were provided. This could include Transparency International, the OECD guidance and associated recommendation and the Serious Fraud Office Corruption Indicator.

There is a potential overlap between risk assessment and due diligence. It would make sense for Principle 1 to cross refer to Principle 3.

We understand that there has been a suggestion that the SFO would be prepared to issue opinions on whether a situation amounted to a breach of the Act. If the SFO were to be prepared to do this then this could also form part of risk assessment/due diligence.

Principle 2: Top Level Commitment

Again there is overlap between this Principle and Principle 5: Effective Implementation so there should be some cross referral.

It should be made clear that this must be an ongoing commitment and some positive advice as to how this might be achieved – for example a regular review process and a periodic agenda item at board meetings.

Principle 3: Due Diligence

The draft Guidance on Principle 3 is silent as to whether the obligation is ongoing. It is possible to read the Principle as requiring a one-off exercise prior to the drafting and implementation of policies and procedures. When you read the guidance as a whole, it is clearer that the due diligence obligation will be ongoing. It is also apparent that there will be a significant degree of overlap between this Principle and many of the other Principles (ie risk assessment, policies and procedures, implementation and monitoring and review). This is something that should be made clearer as a level of due diligence will be required at almost every stage of the process - the Guidance should say that a level of due diligence will be required in relation to other Principles and that the due diligence obligation is an ongoing duty.

The Guidance could say more about how the Principles interact with existing guidance/best practice concerning other legislation. The explanatory notes about the consultation paper make it clear that the guidance is intended to complement rather than replace other forms of bribery prevention guidance but there is no indication of whether compliance with one set of guidance might discharge an employer's obligations for the purposes of section 7 of the Act. It is obviously not the function of the Guidance to tell people how to comply with other legislation, but there is a danger that a lot of overlapping guidance/standards will simply create confusion rather than being of assistance to employers seeking to implement effective anti-corruption policies.

There is no indication of when reliance on external advice (from lawyers, consultants etc) might discharge an employer's due diligence obligation. This may be particularly important for small or medium sized organisations or those that do not have frequent business dealings with a high level of risk in relation to corruption. The examples do not help in this respect and it would help if the Guidance contained some clear statement about when it might be sufficient to be guided by external advice.

Although there are some benefits to the Guidance not being over-prescriptive, smaller companies which are unaccustomed to undertaking much due diligence may find it helpful to see further details of what it is expected. For instance, the due diligence principle at the moment only briefly mentions location, business opportunity and business partners. It may be useful to provide further examples of the areas that should be covered to give companies ideas, without saying that companies *must* cover them and so imposing further burdens.

Principle 4: Clear Practical and Accessible Policies and Procedures

The Guidance could be clearer in saying that, having carried out the risk assessment and due diligence, businesses will be in a better position to develop polices that relate to, and are proportionate to, the specific risks identified and the resources available to the business. This will be particularly helpful for smaller businesses in identifying the extent of steps to be taken in their particular case.

The section headed "Policy and Procedure Documentation" includes a suggestion of including guidance on what to do when faced with blackmail or extortion. This seems slightly off point compared to the rest of the guidance and could be better explained. For example, this could relate to an example where an employee is being pressured into making facilitation or similar payments - ie the business could give some guidance on how an employee should act.

On a simply technical point, the reference to Public Interest Disclosure Act 1998 should really be to the Employment Rights Act 1996 and the guidance could be clearer in suggesting an appropriate whistleblowing procedure, including guidance for whistleblowers.

The reference to a possible code of conduct forming part of the employment contract could be better explained. The least troublesome way of doing this would be by including an obligation to observe the code of conduct as a disciplinary rule (which would not normally require a formal

change to contracts of employment) as opposed to a formal change which is probably unnecessary in terms of meeting the goal required and which employers may find unduly burdensome.

The reference to modifying sales incentive arrangements to give credit where orders are refused where bribery is suspected seems rather unrealistic. It would be more pragmatic to suggest that incentive arrangements are reviewed to ensure they do not incentivise people to act improperly and that credit will obviously not be given where bribery is suspected.

There could be a reference to ethics hotlines or similar structures, although probably only appropriate for larger businesses and would need to be linked into whistleblowing procedures.

The section on management of incidents of bribery would be better placed in Principle 5: Effective Implementation section.

Principle 5: Effective Implementation

Reference is made to a number of considerations but these appear to be confined to "larger companies". S7 refers to "adequate procedures" as necessary to make out the defence. That appears to be a constant standard not elastic according to size and resources of the organisation (as might have been the case if "adequate" had been replaced by "reasonable") so in effect no guidance is offered to SMEs which will be likely either to confuse them or suggest that they are not subject to these requirements

There could be included advice as to how information about bribery is processed in terms of dealing with a specific situation and then learning points from it. This could link in with the periodic board meeting reporting point made above as well as with the Due Diligence Principle. The essential point is that monitoring bribery and modifying corporate activity and procedures to take account of it and improve the adequacy of procedures is what is required.

As noted under Principle 4 there should be included clear information as to how those who want to speak out about bribery can be supported.

There should be a clear link between reporting and Principles 1 and 2.

Under "Internal Communication" there could be highlighted a need to positively address bribery as an issue when a new industry sector or geographical market is entered.

Under "External Communication" there could also be a reference as to what steps are to be taken in relation to new business partners or clients

Principle 6: Monitoring and Review

We have made the point above that we consider more detailed guidance would be desirable to enable companies to know what is sufficient to be adequate. The areas where more detailed guidance would be welcomed here include:-

- as well as designating someone within the organisation to be responsible for the anti-bribery policy, an individual also identified to be the point person who would actually monitor the processes in place and deal with the preliminary investigation of suspicious incidents etc;
- how a company might review the adequacy of procedures when it enters a new market;
- internal communications and periodic training of employees in specified roles (rather like review training for money laundering);

- how a company can satisfy itself that the steps it is taking are “adequate”. The fact that there have been no suspicious incidents does not necessarily mean that the company’s anti-bribery policies and procedures are adequate. In fact it could mean the opposite - because such activity remains hidden.
- how far a company should take cognisance of external events (not involving itself) in its sector or geographies where it does business. For example if there is an newspaper allegation a competitor, does this put the company on alert to review all or part of its anti-bribery procedures?
- to what extent should a company engage in ad hoc spot checks on certain transactions with customers/suppliers?
- a summary of the range of review mechanisms which a company might consider, and where these are appropriate.

Many companies may be tempted to seek to outsource the review and trigger processes to an external organisation that has greater expertise and/or resources. Guidance would be helpful on what steps (checks and balances) the company should consider taking to ensure that such external organisation is compliant on its behalf. This is a different process to an audit by an external organisation of how the company’s own anti-bribery procedures are working.

The Guidance may also usefully remind employers that they need to steer clear of developing policies and procedures based on racial stereotyping of certain nationalities, but rather base it on hard evidence of risk of bribery (therefore requiring a high degree of assessment and review).

Working Party

Sarah Howlett – McGrigors
Adrian Martin- Burges Salmon
Stefan Martin – Allen and Overy
Caroline Stroud – Freshfields
Lorraine Teague – Shakepeare Putsmans
David Widdowson – Bevan Brittan (Chair) david.widdowson@bevanbrittan.com
Fraser Younson – Berwin Leighton