

Bond Governance Group Submission

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

Reference Number: CP11/10

1. Introduction

Overall, the Bond Governance Group believes that the guidance is well framed with language that strikes a good balance between offering practical help to businesses that want to prevent bribery without opening loopholes that could be exploited by unscrupulous companies.

The Bribery Act has been passed into law in acknowledgement of the damaging effects of bribery and corruption, and the need to stop supply-side bribery if corruption is to be tackled successfully. This fulfils the UK's international commitments and should also create a more secure basis for economic activity and business success.

However, there are indications that, since the Act received Royal Assent, vested interests may be seeking to dilute the Act, allowing those who pay bribes to continue business as usual – in other words, to continue to pay bribes. This consultation exercise, and the wording and status of the guidance, presents one such opportunity for vested interests to weaken the Bribery Act, having previously lost the argument in Parliament. We note that such vested interests habitually voice strong support in principle for anti-bribery laws, but then try to sabotage effective laws through opening loopholes or delaying implementation.

We therefore want to reinforce the case for strong anti-bribery legislation and enforcement, outlining here some of the fundamental arguments of Bond members, who represent some of the world's largest and most experienced development and advocacy NGOs.

2. The damaging effects of bribery

Corruption has devastating effects on developing economies and their citizens' quality of life. Its cost in Africa alone has been estimated at US\$148 billion a year, representing

25% of the continent's GDP.¹ Corruption undermines economic growth rates and cripples public services, as money which should be destined for reinvestment and public expenditure finds its way into private bank accounts, often abroad.

Corruption seriously damages attainment of the Millennium Development Goals.² It undermines good governance and tends to permeate all levels of society precluding the poorest from access to basic services and creating barriers to business. Corruption remains one of the major impediments to poverty alleviation, development, good governance and stability, and is a proven source of conflict and insecurity.

Corruption is often thought of as just a developing world problem. But it is driven and facilitated by external actors, many of them in the developed world:

- Companies can actively fuel corruption by paying bribes, or passively fuel it by failing to disclose the legitimate payments they make to governments.
- Banks can sustain corruption by doing business with corrupt officials and accepting looted funds or bribes.
- Jurisdictions with secrecy over financial transactions (including the UK's Overseas Territories) and the financial and legal service providers who operate in them can help the corrupt to hide their ill-gotten assets.
- Donor aid provides vital assistance but does not always adequately tackle corruption, promote state accountability to citizens and transparency in highly corrupt aid-recipient countries.

In all these areas, there have been some improvements in recent years. However, it remains the case that the activities of British companies, individuals and organisations, along with failures and gaps in the regulatory frameworks, can seriously undermine development, the success of UK companies overseas, and the effectiveness of aid provided by the UK and other donors.

Finally, we would like to note that Bond members fully support the UK's willingness to stand with the USA and other OECD members to take a leadership position on international bribery. We will be using our global networks to call on other jurisdictions to follow suit.

3. The advantages to UK businesses from tackling bribery

In addition to the strong ethical case for fighting bribery and corruption, there is a sound business rationale that underpins the Bribery Act. Reductions in bribe-paying cuts demand for bribery in the long term; this allows reputable companies to compete on

¹ According to an often quoted African Union study on corruption in Africa that was prepared in 2002 and which fed into the development of the African Union's anti-corruption declaration approved in 2003 – see: Smith, Pieth and Jorge (February 2007). "The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention Against Corruption", Briefing Paper. Prepared for the Basel Institute on Governance, International Centre for Asset Recovery. Published by the U4 Anti-Corruption Resource Centre, Norway,
<http://www.u4.no/themes/uncac/assetrecovery.cfm#scope>

² UNDP, Governance for the Millennium Development Goals: core issues and good practices, Jan 2007,
<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025110.pdf>

grounds of the pricing and quality of their products and services, and not through the lottery of bribe-paying.

There is therefore a compelling business case for tackling corruption, which includes:

- Creating a level playing field for business, in which sales and contracts are won through an open market rather than through bribery.
- Creating greater security for contracts through ensuring they are legally obtained
- Reducing the cost of doing business through eliminating the 'bribery premium' in contracts.
- Downgrading corporate risk in key markets, reducing the cost of capital, insurance premiums and other operational costs.
- Increasing value for money in aid and development spending.
- Creating a more politically stable and secure environment in which British companies and investors can operate.

4. General principles relating to this consultation

We would like to outline three principles that we believe should underpin the guidance that is published as a result of this consultation.

No loopholes. The guidance should not create loopholes for companies that have put in place a procedure that appears adequate on paper, but in fact allows bribe-paying to take place. The experience of prosecutions in the US, and of recent cases in the UK, suggests that this is a significant risk. It is therefore important that the guidance remains principles-based, does not encourage a tick-box approach, and is not given a status that creates a 'safe harbour' defence. In particular, we believe that concerns expressed by companies about areas such as hospitality, gifts and promotional expenditure in relation to foreign public officials are adequately addressed, and should not be subject to further guidance. We note that recent FCPA investigation by the US Department of Justice into the pharmaceutical industry has focussed on this area, which illustrates how vulnerable it is to abuse if other areas of bribery are closed off.

Transparency. We expect that all submissions to the consultation will be published on the Ministry of Justice website and attributed to the authors. You will be aware that there are many precedents for this, but also a specific precedent in the area of bribery in the 2005/6 ECGD consultation: <http://www.ecgd.gov.uk/Consultations/anti-bribery-corruption-procedures?cat=closedwithresponse>. We see no grounds for responses to a public consultation on bribery to remain secret or anonymous, and note that if the responses are not made public then we will pursue this through Freedom of Information requests.

Universal application. Bribery is damaging and has victims, irrespective of who pays the bribe or for what reason. It is therefore important that the Act is seen to apply to all individuals and organisations, whether in the private, public or voluntary sectors. Exceptional circumstances, such as payments made under significant duress in order to safeguard directly the lives of others, should be dealt with by the public interest test within prosecutorial discretion – while noting that this creates a potential loophole and so must be subject to rigorous examination. There is clearly some confusion as to whether Section 7's definition of a 'relevant commercial organisation' applies to certain types of

organisations such as Humanitarian Charities and Social Enterprises. However, we believe this is being raised through other responses to this consultation, and so it is not covered in this response. While we note that it is important that any scope for confusion within Section 7 is addressed, we believe that paying and receiving bribes should be illegal irrespective of the type of organisation that is involved.

5. Commencement date

There should be no further delay in the commencement date. The issues of concern raised by companies in relation to the guidance could easily have been dealt with by now. Further prevarication is simply an excuse by vested interests to allow bribe-paying to continue.

6. Responses to the specific questions raised in the consultation

The responses are detailed in the boxes below.

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?

Comments:

Transparency, particularly in relation to payments by companies to governments, has proved extremely important to companies that wish to ensure their operations and business relationships are bribe-free and in providing evidence of this externally. In general, more transparency will mean that companies are less open to allegations of corruption and, importantly, companies may be less likely to be asked for bribes if these payments are to be disclosed. Likewise, high-quality external verification may provide additional levels of protection. We therefore recommend that the sub-sections of Principle 6 on Transparency and External Verification should be expanded and moved to a new Principle 7.

In terms of emphasis, we believe that the following three principles might be particularly emphasised:

- **Tone from the Top:** there needs to be genuine commitment from boards and senior managers, which will include rewarding good behaviours and punishing poor behaviours through remuneration and promotion systems. It should be clear that board members and senior executives face prosecution under section 14 if they 'consent or connive' and therefore that the Tone from the Top is strongly in their self-interest.
- **Due Diligence:** the need to do better due diligence on business partners, and for this to encompass bribery, may come as the biggest change for many companies. However, given the ways in which bribes are typically paid in business transactions, this is a critical pillar. The guidance should

make it clear that due diligence is not an optional extra, even for companies that have not done it before; it is a critical part of an anti-bribery system.

- Effective implementation: it is important for companies to understand that a tick-box approach, or set of procedures that looks good on paper, may not work in practice. Effective implementation is a critical component of this guidance and without it all the other Principles will be rendered useless.

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?

Comments:

Given this is a principles-based document, we do not believe it is appropriate to give great specificity about procedures. Indeed, doing so may inadvertently create loopholes. It is possible that those seeking to pervert the underlying intention of the Bribery Act may argue for greater detail in this guidance as a means of providing loopholes or a safe harbour.

We note that companies should be able to demonstrate that there is a match between policies, procedures and practice, and that procedures are designed, reviewed and adapted on the basis of high-quality and in-depth risk assessment. We recommend that the guidance should clearly reference the need for such an integrated approach.

One procedure that is referenced – in Principle 4 - but may benefit from greater emphasis or detail is the necessity for a well-functioning ‘speak-up’ procedure. This has proved extremely important in bringing cases to light in other jurisdictions. Likewise, ‘speak-up’ procedures should be encouraged not just within a company, but externally when a company feels it has encountered bribery. For example, if a UK company feels it has lost or is in danger of losing a contract to a competitor that is paying bribes, the UK company should be provided with a mechanism for reporting this to the UK government, knowing that action will be taken. It is noteworthy that competitor reporting is one of the prime mechanisms used to stimulate FCPA investigations by the US Department of Justice.

The references within the Due Diligence Principle on the need to make ‘enquiries’ (for example, p. 14) in reality constitute a fairly weak procedure and may not be ‘adequate’. ‘Enquires’ should be strengthened by the need to ‘verify’ in each instance.

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?

Comments:

We support the format and the fact that the draft guidance is principles-based as the purpose of the guidance is to support best practice not to provide a safe haven. We strongly believe that the fundamental structure of the guidance should not be changed at this stage as this could represent a real risk to the integrity of the act and its implementation and would undermine this consultation and those before it.

However, we strongly believe that the first Principle should be Tone from the Top. All other decision-making flows from this Principle.

We reiterate our concern that the Act could effectively be watered down by unscrupulous parties that wish to design procedures with respect to 'particular circumstances', and have them endorsed in the government's guidance, that effectively allow bribery to continue, and thereby pervert the purpose of the Act.

We welcome the section (page 22) on interpretation of hospitality, gifts and promotional expenditure. This is clear and effective and needs no further clarification.

Question 4. Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are they important?

Comments: It is important to emphasise that the Bribery Act covers companies of all sizes and that the fundamental principle for SMEs, as well as larger companies, is that they should not pay bribes. In terms of a procedure, SMEs might benefit from knowing where to turn for practical and immediate help if they are asked for bribes or suspect a transaction may be tainted by bribery.

Question 5. In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

Comments: No comments to add.

Question 6. If you have any further comments on the form or content of the draft guidance, please enter them here.

Risk assessment: we are concerned that current text in the Risk Assessment Principle may open a loophole for companies that wish to dress up an inadequate procedure as an adequate procedure. For example, the phrase that risk assessment procedures 'vary enormously' could create such a loophole. In that instance, we suggest the phrase might be amended thus: 'Although risk assessment procedures vary enormously, a company will need to ensure that it has in place a procedure that genuinely captures and responds to the risks that it is facing, taking into account all information that is reasonably available, and supplementing this with additional information where risks are highest. A procedure that fails to identify bribery risks when they could reasonably have been identified is likely to be considered inadequate'.

Joint ventures and subsidiaries: we note that as bribery laws globally have become stricter, those seeking to evade them have used a variety of corporate structures, such as joint ventures and subsidiaries, to avoid prosecution. We believe that the guidance needs to make it clear that outsourcing bribery through such structures does not constitute an adequate anti-bribery procedure and that any such structure potentially leaves the principal company open to prosecution.

Off-sets: the draft guidance correctly implies that off-sets (page 21) can be a legitimate business activity. However, they are notoriously vulnerable to corruption, and this should be clearly referenced so that it is clear a loophole is not created. It is also noteworthy that companies might be at risk of inadvertently participating in bribery through off-set arrangements – for example, if the company has provided an offset for which the contractor happened to be a company part-owned by a company owned by a government official. Levels of due diligence in off-set arrangements should be sufficient to encapsulate this. It is possible that an additional scenario on the issue of off-sets would be helpful.

Public interest: we note that, just as previous investigations have been dropped on the grounds of 'national security', a public interest test can be open to abuse and political interference. We strongly recommend that this guidance should reference the fact that any act of bribery is against the public interest.

About you

Please use this section to tell us about yourself

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If you would like us to acknowledge receipt of your response, please tick this box	<input checked="" type="checkbox"/> yes (please tick box)
Address to which the acknowledgement should be sent, if different from above	As above

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Bond and the Bond Governance Group

Bond is the UK membership body for non-governmental organisations (NGOs) working in international development. Established in 1993, Bond now has 370 members. These range from large bodies with a world-wide presence to smaller, specialist organisations working in certain regions or with specific groups of people. For further information please contact Bond via their website <http://www.bond.org.uk/>

The Bond Governance Group is made up of 67 likeminded British NGOs who, through their work, witness the devastating effects of corruption on developing countries every day. Our experience has taught us that corruption continues to be one of the biggest obstacles to development, poverty alleviation and good governance. Our aim is to draw attention to the impact of corruption on developing countries and provide a platform for the voices of our partners and southern civil society organizations to be heard in the UK. We intend to use our joint influence to campaign for changes in policy which will help bring an end to corruption around the world. This consultation response was prepared by the Bond Anti-Corruption Group, a sub-group of the Bond Governance Group.

Anti-Corruption Sub Group

CAFOD, Christian Aid, The Corner House, Corruption Watch, Global Witness, Tearfund, Transparency International UK.

Bond Governance Group – Steering Committee

Care International – UK, Christian Aid, Global Witness, One World Action, Oxfam GB, Plan International – UK, Practical Action, Progressio, Save the Children, Tearfund, Water Aid, World Vision - UK