

A Closer Look at the 2010 UK Bribery Act

By Mike Emmick and Bethany Hengsbach

The 2010 U.K. Bribery Act is the new "elephant in the room" of the global anti-corruption effort. The Act sets forth the United Kingdom's counterpart to the U.S. Foreign Corrupt Practices Act (FCPA), and significantly modifies the U.K.'s domestic bribery laws.

Of particular importance are two new cutting-edge provisions that create an offense for companies that fail to prevent bribes paid by their agents or persons "associated" with the company. This provision creates an offense for companies for such bribes, even if management neither authorized nor knew about them.

A second provision creates a related defense: Even if bribes have been paid by a company's agents or "associated" persons, the company will have a full defense if "adequate procedures" to prevent such bribes were in place at the time. This tantalizing new defense took some of the sting out of the new bribery offense, but companies could not readily determine what anti-bribery measures would be regarded as "adequate." Parliament therefore took the unusual step of requiring the Ministry of Justice to issue guidance about what anti-bribery measures should be implemented by companies.

The Ministry issued its guidance on March 30, 2011, and announced that enforcement of the Act would begin on July 1. This two-part article will step back and analyze what the guidance really means. We begin by covering the basics of the Act.

The starting point is determining whether the new provisions of the Act cover your particular company. The distressing news is that the Act's reach is extremely broad, covering not only companies created in or under the laws of the U.K., but also any company that "carries on any part of a business" in the U.K., regardless of where the business was created or where any bribes may have been taken place.

Thus, unless your company is a "mom and pop" operation that was created outside of the U.K. and does only domestic business there, you must assume that the Act applies.

The Act has four provisions relevant to the "adequate procedures" defense. First, it updates the U.K.'s laws regarding garden-variety bribery. The crime of bribery is not limited to bribery of public officials. It also covers "commercial bribery" or "kickbacks" between private commercial entities.

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A second provision prohibits bribes to foreign public officials. As with the FCPA, under this provision, the foreign bribe may have been paid with the intent to "obtain or retain business" or an "advantage in the conduct of business."

Third, the Act creates the new business crime of "failing to prevent bribery." It operates as a strict liability offense — the provision is violated by a management member who either did not know about the bribe so long as the agent or other "associated person" who paid the bribe was otherwise performing services on behalf of the company. Importantly, the "failure to prevent bribery" offense is not limited to foreign bribery or to the bribery of public officials.

Fourth, the Act provides a full defense to the "failure to prevent" offense if, at the time the illegal bribe was paid, the company "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct."

In response to the guidance, companies who hoped for specific advice were disappointed. The guidance is remarkably general, providing only a description of considerations and approaches that might help companies frame their anti-bribery programs. Such advice, however, was already available from other sources.

The guidance discusses six "principles" that companies should consider in crafting their compliance programs: Procedures that are proportionate to the bribery risk; top-level commitment to the anti-bribery program; a realistic assessment of the company's bribery risks; due diligence in exploring those risks; communicating the anti-bribery measures clearly and forcefully; and periodically monitoring and reviewing the program.

This general approach is understandable. The subject of adequate anti-bribery measures is too complex to permit the prescription of any



Turkish Cypriot tycoon Asil Nadir, 69, returns to the U.K. in 2010 to face fraud allegations. He is charged with 66 counts of theft involving 34 million British pounds.

specific formula for compliance because the range of possible business environments and anti-bribery measures is virtually unlimited. The Ministry of Justice was reasonably concerned that any specific formula might be misinterpreted, taken out of context, or even abused. For that reason, the guidance expressly disclaims being "prescriptive" or a "one-size-fits-all document," and insists that whether a company's anti-bribery procedures are adequate "can only be resolved by the courts taking into account the facts and circumstances of the case."

As a consequence, the guidance does little more than say to companies, "Do what is reasonable and effective. No guarantees. Trust us to be fair."

The procedural context of the new defense is also unappealing. "Adequate procedures" is not a regulatory pronouncement where the government will assess the adequacy of a company's anti-bribery program in a vacuum. Rather, it is an affirmative defense considered only when an illegal bribe has already been paid. Companies are understandably concerned that under those circumstances, if the company asserts the "adequate procedures" defense, the government might respond with: "Well, if a bribe occurred, your anti-bribery procedures weren't adequate, were they?" Thus, from a business' point of view, it is difficult to be enthusiastic about a new or modified compliance program that will later be evaluated only under the cloud of its own failure.

Companies are additionally concerned about the uncertain weight and legal status of the guidance. The guidance does not have the force of law. As a result, questions still linger: How much weight will courts give the guidance? Is it a defense if a company makes a good faith but inadequate effort to comply? What will happen if the Ministry of Justice's views change?

Finally, whatever the guidance says, the Act will still be implemented by prosecutors, who will exercise their individual judgment and discretion. That discretion is governed by the Code of Crown Prosecutors, which requires prosecutors to first consider the evidence and then determine if a prosecution is in the public interest.

The "public interest" consideration may seem enticing to companies, but it also has its limitations. In a parallel set of guidance regarding the Act, the U.K. Serious Fraud Office and the Director of Public Prosecutions stated that "a prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favor." That standard is not particularly reassuring for companies looking for lenience.

Notwithstanding, other considerations support a more favorable reaction to the guidance. First, the U.K. should be commended for attempting

to issue any guidance at all. Many countries would have passed the new bribery law and wished businesses good luck.

Companies should also be pleased that the U.K. decided to create a full defense based on the existence of "adequate procedures." Many similar bribery laws, such as the FCPA instead relegate the consideration of compliance programs to the prosecutor. At least in the U.K., if a company is disatisfied with the "credit" the prosecutor has assigned, it can choose to litigate that issue in court — an option that is unavailable elsewhere.

Some comfort is also warranted by the Act's requirement that formal charges must have the personal consent of the highest-level prosecutors. For companies concerned about overly-aggressive young prosecutors, this requirement provides some assurance of "adult supervision."

Although the guidance is less helpful than some companies might have liked, the overall assessment is not all bad. Indeed, upon closer examination, the guidance and the Act provide some valuable nuggets of advice — a topic to be discussed in the conclusion of this article.



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