

Guidance on the New U.K. Bribery Act

The U.K. Ministry of Justice has recently issued its guidance (the “**Guidance**”) regarding the U.K. Bribery Act 2010 (the “**Act**”), which is to come into effect as of 1 July 2011. Given its extraterritorial jurisdictional implications, we believe that the Act is of relevance to Turkish and other non-U.K. companies doing or thinking about doing business in the United Kingdom or with U.K.-based companies.

The Act prohibits (a) the offering, promising or giving of a bribe (active bribery), (b) the requesting, agreeing to receive or accepting of a bribe (passive bribery) and (c) the bribing of a foreign public official in order to obtain or retain business or an advantage in the conduct of business.¹

Furthermore, and most significantly for non-U.K. companies, the Act creates a new form of corporate liability for “failing to prevent bribery” on behalf of a commercial organization. However, the Act also creates a full defense if a company can demonstrate that it “had adequate procedures in place” to prevent persons associated with it from engaging in bribery (such adequacy to be determined by the courts taking into account the particular facts and circumstances of the case).²

The “failure to prevent bribery” offense applies to (a) a body or partnership incorporated or formed in the U.K. irrespective of where it carries on a business, and (b) an incorporated body or partnership which “carries on a business or part of a business” in the U.K. irrespective of the place of incorporation or formation. The Guidance states that for non-U.K. entities, whether such an entity will be deemed to carry on a business or part of a business in the U.K. will be answered by “applying a common sense approach”. The Guidance also states that the following cases would not, by themselves, be deemed to be carrying on a business or part of a business in the U.K.:

- The mere listing of the non-U.K. company’s shares on the London Stock Exchange, without more; or
- The presence of a U.K. subsidiary if that subsidiary is acting independently of its parent or other group companies.

As described above, the Act defines “bribery” broadly and imposes severe sanctions on offenders (for example, the maximum sentence for bribery committed by an individual is 10 years of imprisonment), and gives U.K. courts wide jurisdiction over alleged offenses. It remains to be seen how the U.K. Government will enforce the Act in practice and how U.K. courts will interpret and apply certain concepts under the Act. In the meanwhile, companies doing business in the U.K. should start reviewing their existing procedures to make sure they are compliant with the requirements of the Act. In that regard, the Guidance

¹ It is important to note that, unlike the U.S. Foreign Corrupt Practices Act, the Act does not provide an exemption for “facilitating payments” (*i.e.*, small payments made to facilitate routine government action).

² A company will be liable under the “failure to prevent bribery” offense if a person “associated” with it “bribes another person intending to obtain or retain business or a business advantage for the [company]”. In order to be considered as being “associated” with a company, a person must be “performing services” for or on behalf of that company. An associated person may be an individual or an incorporated or unincorporated entity (such as a joint venture partner).

sets out “proportionate procedures” as the core principle of the Act.³ That is, a company’s procedures to prevent bribery by persons associated with must be “proportionate to the bribery risks it faces and to the nature, scale and complexity of [its] activities”.

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³ The Guidance states that the other five principles are (i) top-level commitment, (ii) risk assessment, (iii), due diligence, (iv) communication (including training) and (v) monitoring and review.