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

Response of PricewaterhouseCoopers LLP to the Ministry of Justice Consultation Paper CP11/10

Introduction

This document sets out the response of PricewaterhouseCoopers LLP ("PwC" or "we") to the Consultation Paper issued by the Ministry of Justice concerning guidance about commercial organisations preventing bribery ("the Consultation Paper") pursuant to section 9 of the Bribery Act 2010 ("the Act"). The Consultation Paper poses five specific questions to guide the structure of responses and PwC's response is set out under those heads. Before turning to those questions in detail, we have a number of observations of a general nature, which provide context to our responses.

PwC recognises and welcomes the Act as an important step forward in the UK's contribution to the worldwide effort to combat corruption. We view the inclusion of section 9 of the Act, which requires the Government to issue guidance about commercial organisations preventing bribery, as a necessary and positive component of the Act, which should help to clarify for the benefit of relevant commercial organisations how they should go about mitigating the risk of bribery in their business activities.

Given our extensive experience of working with commercial organisations to assist them in designing and implementing anti-bribery programmes and controls, we are aware of the challenges inherent in drafting guidance which is required to be relevant and useful to organisations of all shapes and sizes. There is no one-size-fits-all solution and therefore any guidance of this nature is bound to be generic and principles-driven and, above all, cannot seek to be prescriptive. Overall, we consider that the draft guidance as set out in the Consultation Paper achieves an appropriate level of detail in this regard.

Executive summary

We make a number of points, which are developed throughout this document. In summary, the key points include the following (bracketed references indicate where we discuss further):

- We think it likely that courts, prosecutors and defendants will look to the guidance in determining whether adequate procedures were in place in a given case. Evolving precedent may in due course clarify the manner in which the guidance is applied and interpreted, but this is of scant assistance to commercial organisations at the current time

as they consider their risks and the potentially costly additional anti-bribery measures necessary to mitigate. Given all of this, the quality and clarity of the guidance itself will be of critical importance (see Further discussion of key points, p.3);

- The guidance needs to be clearer about the fundamental link between the results of the risk assessment and the development of appropriate mitigating procedures. This issue pervades the guidance as a whole and, accordingly, also the comments set out in this response (see Further discussion of key points. p.4; and answer to question 2, p.8 and generally);

- As an example, the guidance should be clearer about the risk dimension in determining appropriate levels of due diligence, recognising that some third party relationships present more risk than others. Greater clarity around the impact of different levels of influence or control over associated persons/entities and third parties and what "performing services for or on behalf of" means for practical purposes would be beneficial (see Further discussion of key points, as above; and answer to question 2, p.10);

- The guidance could be more definitive on certain points. The use of tentative language designed to avoid being too prescriptive is, we think, misplaced in relation to certain important matters. Some of the examples given demand a more definite response than the guidance suggests. As an example, we consider it essential that there is clear ownership of and accountability for the anti-bribery programme in any organisation, whereas the draft guidance merely suggests this as something to consider (see Further discussion of key points, p.5);

- The guidance refers at various points to the potential need to obtain assurance over anti-bribery programmes. This is a complex and evolving area and we do not advocate that the guidance should seek to provide an answer to all of the issues that arise on this point. However, we consider that the guidance should acknowledge some of the challenges, including the need to define the subject matter of assurance, the criteria against which assurance will be delivered, the level of assurance sought and the purpose of any assurance activities (see answer to question 2, pp.13 and 14); and

- The guidance would benefit greatly from the inclusion as an integral element of some simple, realistic, forward-looking (rather than retrospective) case examples (see answer to question 3, p.14).

Further discussion of key points

Status of the section 9 guidance

The Government has been consistent in its position that the guidance is not intended to be interpreted as a check list, compliance with which would somehow provide "safe harbour" to commercial organisations. It is, rather, intended to inform the manner in which commercial organisations consider their risk exposure and the mitigating programmes and controls that may be necessary. This seems clear enough, however the practical reality is that, in determining whether or not a company had adequate procedures at the time of an alleged bribery offence, prosecutors, defendants and the criminal courts will all need to have some framework to guide them. It seems likely, therefore, that the first criminal proceedings under Section 7 of the Act will create some precedent around the status and interpretation of the guidance. As that precedent starts to evolve, so the quality and clarity of the content of the guidance will become increasingly important.

While it stems from a provision in the Act, the guidance is, as we understand it, non-statutory. Furthermore, the draft guidance contained in the Consultation Paper comprises a number of elements, the status of which varies. Thus, we have the draft guidance itself; there is also some "Further information about the Act"; and then there are the illustrative examples, which are explicitly said not to be part of the guidance.

The uncertainty of status is compounded in relation to the illustrative examples, which are not part of the guidance as such. We make some further observations about the style and content of the illustrative examples under question 3 below. It is not clear to us why some simple, realistic illustrative examples should not form part of the guidance, given that the guidance itself is not intended to be definitive, exhaustive or prescriptive.

Likewise, the section entitled "Further information about the Act" contains some useful indications, for example, about the government's stance concerning hospitality and promotional expenditure. A prevalent concern on the part of corporates has been the fact that the Act as written might, intentionally or otherwise, outlaw legitimate activities that are part and parcel of business life. Assurances about the exercise of prosecutorial discretion provide limited comfort to corporates, none of whom, understandably, will want to be the one to test the limits of such discretion. Therefore, statements such as that included, for example, at page 22 of the Consultation Paper that "*reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and*

services, or establish cordial relations, is recognised as an established and important part of doing business" are broadly helpful, and we would advocate that they should be unequivocally included within the guidance.

Proportionality: the risk based approach

In its introduction to the six principles on page 12 of the Consultation Paper, the Government describes the principles as "outcome-focussed and flexible":

> *This is to allow each commercial organisation to tailor its policies and procedures so that they are proportionate to the nature, scale and complexity of its activities. …small and medium sized organisations will, for example, face different challenges compared to large multi-national enterprises.*

We wholeheartedly subscribe to the concept of proportionality with regard to effective anti-bribery programmes. We have two principal observations on the way in which proportionality is treated in the draft guidance.

First, while the nature and extent of anti-bribery programmes and controls will of course be correlated to the size of an organisation and its available resources, the fundamental determinant of whether such programmes and controls are adequate is surely that they are commensurate with the nature and level of bribery risk to which an organisation is exposed. Such risk stems primarily from what an organisation does (and how and where it does it) rather than how big it is, although size can itself, of course, be a contributory risk factor. So, for example, it is possible to conceive of a large retail chain operating in the UK, US and Western Europe, which by virtue of the nature and location of its operations would tend to be considered relatively low risk (no business is entirely devoid of risk). Contrast that with a hypothetical small, recently established company looking to acquire mining concessions in parts of Latin America and Africa. Few would suggest that our large retailer is at greater risk than our small mining company. The challenge for the latter is to establish appropriate anti-bribery programmes that adequately address its higher risk profile but which are nonetheless proportionate to its internal resources. The countervailing advantage for smaller companies is the more direct and immediate overview of high risk activities available to top management.

Secondly, building on the first point above, the draft guidance could be more explicit and forceful about the relationship between risks and effective anti-bribery programmes. Under Principle 1: Risk assessment on page 12 of the Consultation Paper it is stated that:

> *A full understanding of the bribery risks an organisation faces is the foundation of any effective efforts to prevent bribery.*

This is correct. However, this vital relationship does not sufficiently permeate the guidance beyond Principle 1. For example, under Principle 3: Due diligence, it would be helpful to spell out more explicitly and fully that the level of due diligence required in relation to the third party may reasonably be determined by the nature of the relationship with that third party and, by extension, the potential for that third party to expose the organisation to bribery risk. Without such clarification, references to concepts such as "the organisation's supply chain" may create the misapprehension that any and all suppliers are in the same category as far as the need for due diligence is concerned. In a similar vein, under Principle 4: Clear, practical and accessible policies and procedures (page 15 of the Consultation Paper), it is acknowledged that:

> *Having undertaken a risk assessment and due diligence, a commercial organisation will be in a better position to develop effective bribery prevention policies and procedures.*

Again, this is valid as far as it goes. However, it could, and should, be stated more explicitly that where specific bribery risks (being shorthand for activities and/or relationships giving risk to bribery risk) are identified through the risk assessment process, these risks need to be addressed by appropriate mitigating procedures. Put another way, any significant risk which surfaced from a bribery risk assessment and was then ignored in the design and implementation of anti-bribery programmes would be likely to undermine the credibility and effectiveness of such programmes.

In summary, the guidance should be clearer and more explicit throughout about the essential relationship between the bribery risks to which an organisation is exposed and the nature and extent of its mitigating policies and procedures. It should also emphasise the importance of keeping such risk assessments up to date to reflect changes in the organisation, such as new ventures or acquisitions and/or changes in the business environment. Furthermore, risk assessment should be incorporated into the process of making key business decisions.

Language

One feature of the guidance which, though understandable, is not always helpful is the prevalent use of tentative language in the form "may wish to …". In its laudable determination not to be overly prescriptive, the Government has in some cases erred in the other direction. So, for example, it is stated under Principle 2: Top level commitment at page 14 of the Consultation Paper that:

> *Maintenance of a clear top-level commitment to anti-bribery policies may be assisted by the appointment of a senior manager to oversee the development of an anti-bribery programme and to ensure its effective implementation throughout the organisation.*

This point could, and should, be stronger. Our experience tells us that effective anti-bribery programmes require appropriate governance, including clear senior accountability for the overall programme. To make this point is not to propose a prescriptive, one-size-fits-all solution on all organisations, regardless of size or risk profile. It is simply to say that someone should take charge, whether this involves a full time job leading a substantial compliance (or similar) team in a large multi-national, or a part-time (but clearly defined) role for a suitably senior person in a smaller organisation.

Another example comes under Principle 3: Due diligence, again on page 14 of the Consultation Paper, where it is stated that:

> *Organisations may also wish to consider the risks associated with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public office holder.*

Again, we would argue that the language is too soft in the context of the scenario given. In our view, faced with the situation depicted, it would be not only desirable but essential to consider and take appropriate steps to mitigate the risks. Looked at another way, few would consider a company that failed to consider and address such risks to have carried out adequate due diligence.

We do not here attempt to evaluate every use of phrases of the nature of “may wish to”, and indeed by no means all such instances are inappropriate. However, we would invite the Government to revisit the relevant passages to see whether the use of such language in every case conveys the right message.

We now turn to the specific questions contained in the Consultation Paper.

Answers to questions in the Consultation Paper

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

No. The principles outlined in the draft guidance are capable of accommodating the key elements of an effective anti-bribery programme.

However, we consider the concept of transparency of key importance in the prevention of bribery in commercial organisations. The concept is touched upon in the draft guidance (for example, in relation to key bribery risks, and monitoring and review), but, as the guidance stands, the only top management actions suggested are the preparation of a statement of commitment, involvement in developing a Code of Conduct, and the assistance of a senior manager to oversee the development of an anti-bribery programme. We are of the view that these are insufficient to achieve either an appropriate level of corporate governance of the business or to secure anti-bribery commitment.

The concept of transparency envisages a clear anti-corruption culture throughout the organisation, with real and evident commitment from the board and the company's chief officers to conducting an ethical business. This means that, in addition to preparing a statement and being involved in developing the programme, top management are transparent in their procurement and investment policies, in the way they conduct business, and in their own behaviours, such that their integrity is beyond question.

Accordingly, in our view the guidance should place greater emphasis on the concept of transparency across all applicable principles, evidenced by procedures that could include, at least, board/owner level consideration of the risk assessment process as part of their general consideration of the risks facing the business, and consideration of planned and actual responses to breaches of the organisation's anti-bribery policy and procedures.

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?

The draft guidance does not purport to set out an exhaustive list of procedures that might be applicable. Likewise, we do not propose to augment the procedures which do feature in the guidance with every other procedure we have observed in, or helped to design for, our clients. We will restrict our comments to some observations on the procedures specifically mentioned and suggest a limited number of additional ones which we consider worth general consideration.

As a general point, the guidance is silent on the issue of how the policies and procedures associated with the six principles should be documented. In our view it is impossible and undesirable to be prescriptive on this matter. Above all else care should be taken not to create a disproportionate administrative burden on commercial organisations. It is not clear whether the Government has any particular expectations in this regard. To the extent that it does, these should be set out as clearly as possible in the guidance.

Risk assessment

Overall, the guidance needs to be clearer about the principles that ought to guide an effective risk assessment process. First, there are different categories of risk. These include (amongst others) "inherent risk", which is in simple terms the risk to which a business process, activity or relationship exposes an organisation (ignoring the impact of any mitigating controls); and "control risk", which is broadly speaking the risk that a control designed to prevent something going wrong (in this context, a bribe being paid) fails to operate effectively. We would not wish to advocate the adoption of unnecessary jargon or too technical an approach to risk assessment in the guidance. However, there is a general recognition that it is good practice in risk assessment exercises to focus initially on inherent risk, that is, to ask the question "what sort of risks are we exposed to by what we do?" without at that stage introducing any assumptions about the effectiveness of controls. It would be helpful for the guidance to make this point in some form, and to recognise that there is an important distinction between inherent risk and control risk, which are somewhat conflated in the existing draft.

Secondly, while the division of key bribery risks under the three heads of country risk, transaction risk and partnership risks is a reasonable way to present different areas of inherent risk, there are some important additional considerations which would helpfully amplify these. For example, in the case of country risk, there is no explicit mention of local cultural norms or business practices which might present challenges from a Bribery Act perspective. In reality it is such local practices that often cause the biggest headache for corporates trying to do business in a foreign country.

Under transaction risk, there are some relevant examples given (although involvement of intermediaries or agents might sit better under partnership risks), however some pointers as to the basic principles for identifying transaction risk might also help. For example, transactions can be seen as related to those that are core to the business (sales, supplies of core goods or services, paying taxes, etc); those that are ancillary but support the business (obtaining licences and permits, involvement in legal proceedings, obtaining visas, etc); and those that are aimed at enhancing the organisation's standing and relationships with others (gifts, hospitality, charitable

and political donations, sponsorship, community relations, lobbying, etc). There are many other possible taxonomies, but the point is to highlight the breadth of activities which an organisation should take into account in considering its bribery risk exposure and to encourage a structured approach so that important areas do not get overlooked.

We consider that "relationship risks" would be a more appropriate term than "partnership risks". Not all relevant relationships are necessarily thought of as partnerships. This broader term would accommodate a range of relationships including customers, relevant suppliers, intermediaries of various kinds, joint venture partners and consortium partners, amongst others. Again, the point is to encourage organisations to think broadly about the relationships they have and to consider how these relationships might expose them directly or vicariously to bribery risk.

We note also that there is no mention of some of the other risk factors commonly recognised to be prevalent where fraud or corruption occur. These are encapsulated, for example, in the widely known "fraud triangle"[1], which highlights three key factors, namely: incentives and pressures (circumstances that might motivate corrupt behaviour); opportunities; and rationalisation or attitudes (ways of thinking which seek to justify unethical behaviour). Organisations should consider not only how and where in their business bribery could occur, but why it might do so, and frameworks such as the fraud triangle can be useful in focusing thoughts in that regard.

Finally, qualifications for undertaking risk assessment procedures might also include 'objectivity', with the use of an external professional enhancing through a facilitating role the internal risk assessment by providing an independent view and challenge to the internal procedures. As it stands, the guidance suggests that using an external professional is an alternate to carrying out an internal risk assessment, which we do not consider to be the optimal model. Risk assessment should be built into the organisation's business processes. External involvement may well be helpful in advising companies how to establish suitable risk assessment procedures and in providing some objective periodic validation, but it is not desirable or sustainable in the longer term for an organisation to rely exclusively on external advisers to carry out appropriate risk assessment.

[1] The Fraud Triangle is credited to the American criminologist, Donald Cressey. It is widely recognised by anti-fraud practitioners and features amongst other things in international auditing standards such as SAS 99 and ISA 240.

Top level commitment

We agree that top level commitment is vital to ensure that a strong anti-bribery culture is inculcated throughout the organisation and that anti-bribery programmes and controls receive the attention and investment required to make them effective. The guidance could make more of the importance of continuity in this regard. Top level commitment is a continuing phenomenon, not a one-off event. Particularly in larger organisations, where people come and go and where there is greater separation between top level management and the majority of employees in the organisation, regular communication will be an important feature of conveying top level commitment. As with all other elements of the anti-bribery programme, there is no one right answer, but it is clearly an important objective of top level management to satisfy itself that its anti-bribery stance is understood throughout the organisation and that this stance is clearly and consistently communicated over time.

Furthermore, as stated in our introductory remarks, we believe in the importance of clear leadership of and accountability for the anti-bribery programme. The guidance should be more forthright about this element.

Due diligence

As stated in our introductory remarks, the guidance concerning due diligence should be more explicit about the link between the assessment of risk relating to particular business relationships and the nature and extent of due diligence reasonably required of an organisation in connection with that business relationship. The perennial question for organisations is “how much due diligence can or should we carry out?” The relevant key variables in such a calculation include: the nature of the relationship and, in particular, the extent to which the third party is acting on behalf of the organisation (the language in the Act is “performing services for or on behalf of”); and the degree of influence or control the organisation has over the third party. We believe that it would be helpful for the guidance to say more about the sorts of considerations that might influence the approach to due diligence. So, for example, if the underlying nature of the activity carried out by the third party on behalf of the organisation is inherently risky, that will also elevate the risk to the organisation of its relationship with the third party. Using an intermediary to help secure a large contract with a foreign government, or to open doors for dialogue with a foreign finance ministry about a sensitive tax matter, or to deal with a major delay at a foreign port affecting the import of some high value equipment are all examples of activities typically associated with risk.

Turning to the issue of influence and/or control, many organisations struggle with the question of how far their responsibilities extend with regard to the conduct of associated entities. For subsidiaries, this is relatively clear-cut, since control can be assumed. However, for minority interests, in respect of which the level of influence exercised by the organisation will vary greatly – generally, though not necessarily in proportion to the percentage holding – this is far less clear and the guidance is silent on this issue. The same problem exists in connection with joint venture entities. In relation to consortium partners and joint venture partners (i.e. those third party investors who have an ownership interest in a joint venture entity alongside the organisation), the issue is different again, because here no direct ownership interest exists as such, but rather a – usually contractually regulated – common commercial interest of some kind. It would be useful to include in the guidance some general pointers that might assist organisations in thinking through the implications of a particular corporate or commercial structure for the risks and responsibilities of the organisation, and how far the definition of "performing services for or on behalf of" is likely to extend.

In respect of Due Diligence, 'Location', it would be helpful to include guidance on how enquiries might be carried out and from whom the information might be obtained about the risk of bribery in a particular country in which an organisation is seeking a business relationship.

Finally in relation to due diligence, the guidance should mention the issue of due diligence in the context of corporate mergers and acquisitions. There are numerous recorded cases internationally of companies that have encountered difficulties as a result of acquiring a business that was engaging in acts of bribery, and thereby acquiring the negative consequences of such conduct as part of the package.

Policies and procedures

As stated in our introductory remarks, the relationship between the risks identified through the risk assessment process and the policies and procedures required by an organisation to mitigate those risks should be more clearly and explicitly addressed under the policies and procedures head. We would not propose that any attempt should be made to list all of the areas that might conceivably need to be covered by policies and procedures. Rather, we would advocate more clarity on the principles that might guide the determination of the scope of policies and procedures necessary in a given situation. In the broadest terms, we think that it is reasonable to suggest that organisations should consider the need for specific policies and procedures to address each risk identified. So, where an activity is determined to give rise to an inherent bribery risk exposure, thought should be given to the formulation of a clear policy and/or

guidelines about how such an activity is to be conducted and what safeguards should be put in place to mitigate the risk arising from that activity and, furthermore, what practical procedures need to be in place to ensure implementation of such policy. In addition, policies should include some guidance as to where to seek advice where necessary and how to raise concerns about the actions of others.

The guidance would benefit from illustrative examples in this regard. For example, and to the extent necessary and applicable, in its documentation the organisation sets out clearly:

- What constitutes bribery (and blackmail and extortion) so that it is clearly understood throughout the organisation - bribes may come in unusual guises, making them difficult to identify. Without illustrative guidance by the organisation, there is a risk that instances of bribery go unrecognised.

- The acceptability or otherwise of giving and receiving gifts, including 'in kind' gifts, hospitality and entertainment, as well as guidelines on refusing gifts where they are inappropriate.

- Contract acceptance procedures and contract terms, including, for example, contract review by financial management and in-house legal team, the requirement that contract terms are justifiable on an arm's length basis, that payments are properly authorised and recorded, are not made in cash, are made in the country in which the business takes place, and to the party with whom the organisation has contracted.

Incident management will be a key element in preventing further incidents of bribery, in safeguarding the organisation's reputation, and in demonstrating the effectiveness of its procedures. Therefore the guidance in relation to 'Management of incidents of bribery' should be significantly strengthened. The wording as it currently stands is insufficiently categorical, suggesting that incident management procedures are optional in preventing bribery. Every organisation should have plans in place to deal with bribery. Without such a plan, it is unlikely that appropriate action will result, even where the other principles and procedures are in place.

Effective implementation

We agree that effective implementation is of fundamental importance to the success of an anti-bribery programme. No amount of guidance can fully prepare an organisation, particularly a large, complex business with international operations, for the many challenges presented by the specification, design and implementation of effective anti-bribery programmes and controls. In

addition to the useful list of points for consideration given under Principle 5 on page 16 of the Consultation Paper, we would invite the Government to add a bullet to convey the need to consider what support and guidance local business units around the world may need in implementing policies and procedures issued from head office. This is, in our experience, a common practical challenge, not least because of the inherent tension between the need to ensure compliance with the Act everywhere within the organisation and the need for policies and procedures to make sense and be practicable in different local environments. So, head office needs to define and dictate the appropriate policy parameters, but local business units may need to tailor them, for example by setting locally appropriate monetary thresholds, or other variations, while always, of course, remaining in compliance with Bribery Act requirements.

The other point of principle that should be brought out more strongly is that anti-bribery implementation is fundamentally about corporate culture, people and behaviours. The key challenge is to ensure that people within an organisation (and, perhaps, appropriate third parties as well) understand and believe in the anti-bribery policies and feel confident that they know either how to behave in a given situation or where to turn if they are unsure, and that they will be supported in doing the right thing, whatever the business consequences. Looking at the challenge through this sort of prism can be helpful in evaluating any and all proposed implementation steps.

The guidance suggests that assurance (either internal or external) may be one of the envisaged procedures/outcomes of the implementation strategy. As it stands, the guidance does not prepare an organisation for assurance by, for example, setting out clear criteria or benchmarks for measuring defined subject matter. We do not propose that the guidance should venture too far into this area, however it would be helpful for the guidance to refer to the issue that without clearly understood benchmarks that allow for consistent, repeatable assessment, objective evaluation may not be possible, and little more can be achieved than obtaining one subjective view against another. This is particularly so in evaluating subjective attributes such as behaviours, ethics and extent of commitment.

Monitoring and review

As for policies and procedures, the link between bribery risks and monitoring and review procedures should be made clearer and more explicit. The scoping and design of monitoring and review procedures should be aimed at ensuring that those areas of activity which tend to create the most bribery risk for an organisation should be the ones which receive particular attention.

Against this background, monitoring procedures might comprise activities such as the systematic gathering of information about key high risk activities on a real-time basis so that issues could be flagged promptly and also to enable the risk assessment to be kept up to date. Review procedures might comprise more retrospective, perhaps somewhat more in-depth examination of high risk transactions or relationships in order to test compliance with policy and identify potential failings. Clearly, both the nature and the scale of the relevant risks, as well as the size, complexity and resources of the organisation concerned, will dictate the extent and sophistication of the monitoring and review procedures required and/or practicable.

In respect of 'External verification' under Principle 6, we question both what is intended by the term 'verification' (which suggests an attestation as to the 'correctness' of a subject matter), and what it is envisaged that an external assurer might be asked to 'verify' and for what purpose. As indicated earlier, it is difficult to measure the 'correctness' of behaviours or the extent of those behaviours. Similarly, without clear and objective benchmarks that are widely understood, it is difficult to measure the operating effectiveness of an organisation's policies and procedures or even whether they 'have been applied'. As previously stated, we would not advocate that the guidance should attempt to address this complex area in any depth. We expect that over time, separate initiatives will emerge through which a level of consensus and, perhaps, recognised standards, will evolve. What is fundamental, however, is that it is for the management of commercial organisations to determine what they need assurance on, what level of assurance they need and for what purpose (internal validation, external reporting, etc) and, accordingly, what their approach to obtaining such assurance should be.

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?

As stated in our introductory remarks, some simple, realistic but hypothetical case examples should be included as an integral part of the guidance. Our principal observation on the case examples given in Annex B to the Consultation Paper is that they would be more helpful if they were cast as forward-looking rather than retrospective scenarios. Each of them as currently drafted in effect looks back on a situation where something has gone wrong and an act of bribery of some description has occurred. The reader is then presented with a list of actions, categorised under the six principles, which the organisation could or should have taken to prevent such an occurrence.

In reality, commercial organisations have to deal with situations as they occur, without the benefit of hindsight. What typically happens is an iterative process, where information is gathered and,

perhaps, certain issues emerge, which in turn lead (or should lead) to further appropriate steps being taken to gather more information to assist in decision making. Accordingly, presenting the case examples as a forward-looking, real-time narrative in this way would make them more realistic and more useful as a guide to the relevant thought processes. In particular, it would reinforce the central importance of linking risks identified to mitigating actions.

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 important?

As stated in our introductory remarks, an organisation's bribery risk profile is not necessarily proportionate to the size of the business. Smaller organisations engaging in high risk activities in high risk locations may have far higher overall risk (both in relative and absolute terms) than much larger ones with a lower risk profile. All organisations regardless of size will have the same overall anti-bribery objective, that is, to prevent bribery; the difference lies in the extent and sophistication of the mitigating programmes and controls in place to achieve those objectives. Because of top management's relative closeness to the activities giving rise to bribery risk, smaller organisations should not need to put in place such elaborate or formal mechanisms to achieve their anti-bribery control objectives as would their larger counterparts. This does not, of course, mean that there is any less obligation on them to mitigate the risk of bribery in their organisation.

It would be helpful to small and medium enterprises for the above points to be articulated as clearly as possible in the guidance, so that such organisations can be confident that they are free to find a solution that works for them and is proportionate to the resources that they can realistically devote to anti-bribery programmes.

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?

We have no further points additional to those made elsewhere in this document.