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10559 Berlin
Germany

Friday 31 May 2013

By email: Susan Côté-Freeman at *scotefreeman@transparency.org*

Dear Ms Côté-Freeman,

CONSULTATION ON REVISIONS TO THE BUSINESS PRINCIPLES FOR COUNTERING BRIBERY

The GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 128 members of the group, representing some 82 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

1. This is GC100's response to Transparency International's (**TI**) consultation on proposed amendments to its "*Business Principles for Countering Bribery*". This response is based on the document called "*Consultation Draft March 2013 Revisions*" and TI has agreed that the response could be submitted after the 27 May 2013 deadline.

2. GC100's objective in the prevention of bribery and corruption is to promote high standards of compliance and corporate governance. GC100 considers that this is best achieved by anti-bribery procedures that are proportionate and appropriate for the particular risks faced by the company in question.

3. The UK Bribery Act is widely recognised as setting a gold standard in anti-corruption legislation. It goes beyond the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In particular, the corporate offence in section 7 of the Bribery Act is unique in incentivising the development of robust anti-bribery procedures within companies. The statutory guidance issued by the Ministry of Justice under section 9 of the Bribery Act emphasises that anti-bribery controls should be proportionate "*to the bribery risks* [a company] *faces and to the nature, scale and complexity of the commercial organisation's activities*". These objectives are also reflected in the BS 10500 Anti-bribery Management Systems Specification standard developed by the BSI which aims to "*help establish that the organization has implemented reasonable and proportionate measures designed to prevent bribery*".

4. GC100 recognises that TI has a particular role and objective in combating corruption which gives it a perspective, which, as you explained to us, has led TI to adopt a mandate to

"push the envelope" and create guidelines which are more aspirational. As a result, the proposed amendments suggest procedures that go beyond the Ministry of Justice guidance and BSI standard. In particular, while paragraph 4.1, of the proposed guidance recognises that a programme should reflect the risks faced by the company; this isn't reflected throughout the draft guidance.

5. GC100 considers that seeking to set a standard above what is already considered to be the gold standard internationally may have very limited practical benefit for corporates. The Ministry of Justice has recently decided not to revise its statutory guidance to avoid creating impractical and only aspirational guidance. Set out below are just some examples of where the TI amendments go beyond what is proportionate. They are intended to be illustrative examples and are by no means exhaustive:

   (a) Clause 5.6.1

      (i) The proposed wording states that: *"The enterprise should develop a policy and procedures to* ***ensure*** *that all gifts, hospitality and expenses are bona fide. The enterprise should prohibit the offer, giving or receipt of gifts, hospitality or expenses whenever they could influence or reasonably be perceived to improperly influence the outcome of business transactions."*

      (ii) The use of the phrase "*to ensure*" is one example of where the amendments do not seem to pay any regard to a risk based approach. It is of course uncontroversial that improper gifts and hospitality should be prohibited. In large complex organisations, strong and proportionate policies and procedures may not ultimately ensure that a rogue employee does not abuse hospitality; however, that does not render the company's procedures inadequate. An alternative formulation to consider is that the "*enterprise should take reasonable and proportionate steps to prohibit all gifts, hospitality and expenses that are not bona fide*". (See also clause 5.4.1.)

   (b) Clause 6.2

      (i) Clause 6.2 recognises, but only in part, the distinction that has to be drawn between different types of business relationships. Clause 6.2.2 in its attempt to suggest general guidelines for dealing with business relationships is in our view unhelpful. The procedures that are appropriate for different business relationships may vary significantly depending on the degree of control and risks posed. General rules applying to, for example, suppliers, on the one hand, and agents, on the other, is not realistic.

      (ii) The proposed wording states: "*The enterprise should document relevant aspects of the implementation of its programme* [sic] *or equivalent by associated business entities*".

      (iii) An absolute requirement that companies <u>should</u> document implementation of an anti-corruption policy by an associated party is not proportionate or risk based. There may be circumstances in which it is appropriate to do so, where, for example there are specific concerns about the risk posed by an

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associated party and any concerns about aspects of their implementation of procedures. Equally there are likely to be many circumstances where the associated business entity poses no or little corruption risk (if it is well run, with a good reputation, in a low risk jurisdiction, etc) where taking such a measure would be wholly disproportionate.

(c) Clause 6.2.2.2

(i) The proposed wording states: "*The enterprise should avoid dealing with business entities known or reasonably suspected to be paying or receiving bribes*".

(ii) An absolute requirement that enterprises should avoid dealing with those reasonably suspected of bribery may not be a proportionate or an appropriate response in all circumstances. Organisations cannot act on the basis of mere allegations or innuendo, nor should the investigation of an organisation automatically give rise to a suspicion about its conduct. Companies known to have paid or received bribes may have fully addressed the underlying issues which may also be historic. Knowledge or suspicion about a business entity paying or receiving bribes should therefore be a factor to be taken into consideration in properly assessing the risks associated with the business relationship.

(d) Clause 6.2.2.5

(i) The proposed wording states: "*In the event that policies and practices are inconsistent with its own Programme, the enterprise should take appropriate action. This can include requiring correction of deficiencies in the implementation of the Programme or the application of sanctions*".

(ii) A company's ability to require correction of deficiencies in a third party's anti bribery and corruption programme is not proportionate or realistic with all third parties and will not be reasonable and practical in all situations. A risk-based approach should be taken.

(e) Clause 6.2.2.6

(i) The proposed wording states: "*The enterprise <u>should</u> have a right of termination in the event that business associates engage in bribery or act in a manner inconsistent with the enterprise's Programme*".

(ii) It is not proportionate or realistic to expect to have a right to terminate for any conduct by an associated party in breach of a company's programme. Contracts often involve significant investment of time and risk. It is unrealistic to expect minor breaches of an anti-corruption programme to trigger termination. In addition, it may not be possible to have a right to call for termination in respect of longstanding contractual relationships nor is it possible to vary a contract unilaterally. It is uncontroversial however for there to be a right to terminate if associates engage in bribery.

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(f) Clause 6.2.3

(i) The proposed wording states in relation to joint ventures and consortia: "*Where the enterprise is unable to ensure that a joint venture or consortium has a Programme consistent with its own, it should have a plan for taking appropriate action if bribery occurs or is reasonably thought to have occurred. This can include requiring correction of deficiencies in the implementation of the joint venture's or consortium's Programme, the application of sanctions or exiting from the arrangement*".

(ii) A company's ability to require correction of deficiencies in a third party's anti-bribery and corruption programme is not proportionate or realistic with all third parties and will not be reasonable and practical in all situations. A risk-based approach should be taken.

(g) Clause 6.2.5

The suggestion in new clauses 6.2.5.2 to 6.2.5.5 for a company to investigate and communicate all the way down the supply chain is disproportionate and unrealistic. Many companies have very long supply chains and may have little or no contact with suppliers down the chain. Any mapping or evaluation of the supply chain should be done by applying a risk-based approach.

(h) Clause 6.2.5.3

(i) The proposed wording states: "*The enterprise should, at a minimum, assess the risk of bribery in these critical suppliers and conduct regular monitoring*".

(ii) We believe the ability to conduct regular monitoring must be proportionate and risk based.

(i) Clause 6.2.5.4

(i) The proposed wording states: "*The enterprise should communicate its anti-bribery code to members of its supply chain and work with all critical suppliers to build their own anti-bribery programmes*".

(ii) It is not realistic or proportionate to expect companies to communicate their anti-bribery codes to all members of their supply chain as companies may have little or no contact with suppliers down the chain. Nor is it reasonable to expect companies to work with critical suppliers who have already met the companies' due diligence requirements, in order to enhance their anti-bribery programmes. Companies should take a risk-based and proportionate approach to determining how, if at all, they should assist suppliers in their anti-bribery efforts.

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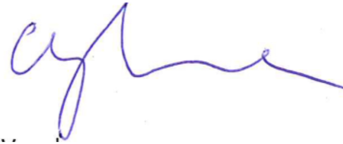
(j) Clause 6.10

(i) The proposed wording states: "*Where appropriate, the enterprise should undergo voluntary independent assurance on the design, implementation and/or effectiveness of the Programme*".

(ii) This clause could be taken to suggest that a programme which is not externally assured is inherently less robust or that an enterprise that does not commit resources to external assurance is less committed and/or transparent. Responsibility for compliance design and evaluation does not need to be outsourced in order to be of the highest quality and the guidance should recognise that internal design and assurance by those who best know the business and the risk faced can often by the most appropriate.

We appreciate the opportunity to provide our comments and would be happy to discuss the draft guidance and our response further.

Yours sincerely,



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