IN THE MATTER OF
GLOBAL WITNESS
AND IN THE MATTER OF
THE DRAFT REPORTS ON PAYMENTS
TO GOVERNMENTS REGULATIONS

OPINION

INTRODUCTION

1. I have been asked to advise on three questions set out in section 4 of my Instructions. I will deal with each question in turn, using the same abbreviations as those used in my Instructions (unless indicated otherwise). I have split the first question into two.

QUESTION 1a: what is the correct interpretation of "substantially interconnected" in recital 45 of the preamble to, and Article 41(4) of, the Directive?

Opinion:

2. Contracts *etc.* are "substantially interconnected" so as to constitute a project when they are connected "as to their substance" or where, to put it another way, they are connected by reference to the economic reality of what is going on under, or pursuant to, them.

Reasons:

3. In Article 41(4) of the Directive, "project" is defined in two ways. It is first defined as meaning the operational activities governed by a single contract, licence, lease, concession or similar agreement. In addition: "if multiple such agreements are substantially interconnected, *this* shall be considered a project" (emphasis added).

4. It will be observed that the first definition of "project" focuses on the operational activities governed by a single contract *etc.* The second definition switches attention away from the operational activities and to the "agreements" (or, for a reason that I will explain below, the "arrangements").

5. Recital 45 expands on the meaning of "'substantially interconnected' legal agreements", which are to be understood as "a set of operationally and geographically integrated contracts, licences, leases or concessions or related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities. Such agreements can be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement".

6. The first point to observe is that the passage from recital 45 quoted above has not been carried over into the operative part of the Directive and, in particular, into Article 41, which contains the definitions relating to reporting on payments to governments.

7. A recital in the preamble to (here) a directive may shed light on the interpretation to be given to a legal rule but it is not itself such a rule: *e.g.* Case 215/88 *Casa Fleischhandel v BALM* [1989] ECR 2789, para 31.

8. Accordingly, recital 45 does not in formal terms contain a definition of "substantially interconnected" (that is, a legally binding definition) but it provides an indication of what is meant by the phrase. I should also note, in connection with recital 45, that the different language versions of that recital vary. Had recital 45 been included in Article 41, or been intended to offer a definition of "substantially interconnected", more attention might have been paid to ironing out the variations between the different language versions.

9. On the basis of Article 41(4), the question whether or not there is a project in the second sense of the term (see paragraph 3 above) arises where there are "multiple such agreements". In my view that refers back to the entirety of the phrase "single contract, licence, lease, concession or similar legal agreements". It is not a reference solely to the expression "similar legal agreements". That is supported by recital 45, which (in the context of the meaning of "substantially interconnected") refers to a set of "contracts, licences, leases or concessions or related agreements".

10. I note in passing that "related", in the phrase "related agreements" in the English version of recital 45, appears as "similar" in the French version (as in Article 41(4)) and "linked" or "connected" in the Italian and German versions; and that "agreements" may mean "arrangements" (see, for example, the French and German language versions). I do not consider that those linguistic variations are relevant to the point made in the preceding paragraph.

11. The significance of the focus on the existence of "multiple such agreements" and of the absence of reference to "operational activities", in the second sentence of Article 41(4), is unclear. I think that the phrase "multiple *such* agreements" (emphasis added) is intended to refer to more than one agreement that governs operational activities. Hence, the second definition of "project" refers to the situation that arises where the operational activities are governed by more than one "substantially interconnected" agreement or arrangement.

12. Under Article 41(4), more than one contract, licence, lease, concession or similar agreement (or arrangement) constitute one project where they are "substantially interconnected".

13. In English, the phrase "substantially interconnected" has the connotation of "interconnected to a substantial extent". The word "substantial" in that rewording of "substantially interconnected" could be replaced by another, similar word such as "great" or "significant". The test proposed, or implied, is one in which a quantitative evaluation, focusing on the (relative) importance of the interconnection, is carried out. "Substantially" does not always mean "mainly" or "largely". Hence, while a degree of interconnection of more than 50% would almost certainly be regarded as "substantial", a degree of interconnection of less than 50% could also be "substantial" (for example, a 40% degree of interconnection).

14. The French version of Article 41(4) uses "substantially interconnected" in a different way. The interconnection must be "as to their substance" ("lies entre eux dans leur substance"; the German version is similar; the Italian version can be translated as "essentially" or "substantially" interconnected, with a connotation closer to the French version than the English). The interconnection is therefore identified by its type or character: a formal connection is not sufficient; the connection must be as to the "substance" of the situation. The test is qualitative, not quantitative: the interconnection is not identified, or determined, by reference to its size or degree of importance.

15. The English version could be given the same meaning as the French version because it is not impossible to construe "substantially interconnected" as meaning "interconnected by reference to their substance" (although that is not the meaning that springs immediately to mind when reading the phrase "substantially interconnected"). On the other hand, I do not think that the French version could be given the "quantitative" meaning that the English version seems to bear.

16. EU legislation is set out in what can be described as a single, multi-lingual text, in the sense that the words to be construed are found in all the (official) language versions of the legislative provision in question. Where consideration of the different language versions

does not provide a conclusive answer to the question of the true meaning of the provision in issue (which may arise where the different language versions diverge), recourse is had to the purpose and general scheme of the measure, its objectives or the need to ensure its effectiveness: see, for example, Case C-36/98 *Spain v Council* [2001] ECR I-779, para 49; Case C-174/00 *Kennemer Golf and Country Colub v Staatsecretaris van Financien* [2002] ECR I-3293, para 33; Case C-434/97 *Commission v France* [2000] ECR I-1129, para 21.

17. Consideration of the English and French language versions of Article 41(4) is sufficient to establish the existence of a problem with a literal reading of the words used in Article 41(4). I do not think that pursuing a linguistic analysis of those words into language versions of Article 41(4) other than the ones that I have consulted would be particularly productive since it would not (in my view) resolve the problem posed by the difference between the English and French language versions.

18. That means that it is necessary to look outside the text of Article 41(4) in order to identify clues as to its true meaning.

19. The most obvious source for such clues is the preamble to the Directive, because the preamble to a legislative measure is often used in order to seek assistance as to the purpose and objectives of a provision contained within the measure.

20. The interpretation of "substantially" derived from the French version of the Directive (as well, one might add, as the German version) is supported by recital 45. The description (I prefer that term to "definition", for technical reasons - see above) of "substantially interconnected" set out there focuses on factors that relate to the underlying economic reality rather than on a test based on some kind of "more or less", or quantitative, evaluation (that view of recital 45 is not dependent upon the language version in which one reads it).

21. I do not think that the French version of Article 41(4) posits a meaning of "substantially interconnected" that is inconsistent with the general scheme or effectiveness of the Directive. Therefore, it seems to me that the difference between the English and French language versions of Article 41(4) is to be resolved in favour of the latter.

22. In English, the word "interconnected" can bear a meaning different from "connected": it may be read as implying a two-way relationship. I do not think that "interconnected" has that meaning in the present context. I think that it simply means "connected" or "connected with one another". That seems to me to be supported by the other language versions of the Directive that I have consulted and by recital 45.

23. Thus far, on the basis of Article 41(4), it could be said that more than one contract *etc.* constitute a project when they are connected "as to their substance". I doubt if the phrase "connected in reality" quite gets to the intended meaning. One could, perhaps, say that the connection must relate to "the economic reality of what is going on under, or pursuant to, the contracts *etc.* in question".

24. I should observe that one must be careful to avoid transforming the exercise of understanding what a legislative provision means into the different exercise of substituting different words for the language actually used in the provision being construed. The intention of the legislature is always to be found in the words used in the legislation (as illuminated by admissible aids to interpretation, such as the preamble and, subject to certain conditions, the legislative history) rather than in the glosses placed on those words by other people in order to explain them.

25. Turning now to recital 45, the description of "substantially interconnected" given there is not stated to be the only way in which the phrase can be understood (the recital does not say, for example, "'substantially interconnected' legal agreements should be understood as being *only* a set of..."); nor, of course, does recital 45 provide a definition (in technical and formal terms) of the phrase. On the other hand, it is reasonable to read recital 45 as indicative of what falls within the phrase "substantially interconnected".

26. For the purposes of recital 45, more than one contract *etc.* constitute a project if they have the following characteristics: (i) they are a "set"; (ii) they are integrated both operationally and geographically; (iii) they have "substantially similar terms" (the English and Italian versions) or employ "fundamentally identical modalities" (the French version) or have "fundamentally similar requirements" (the German version); (iv) they are signed with a government (by implication, the same government); and (v) they give rise to payment liabilities (that list seems to me to be common to all the language versions of the Directive that I have consulted).

27. It seems to me that that is indicative of a situation in which more than one contract *etc.* are connected "as to their substance". On the face of it, operational and geographical integration are necessary but not sufficient conditions for the contracts *etc.* in question being "substantially interconnected". They must also have essentially (my word) the same terms, modalities or requirements. That seems to refer to something about the content of the contracts *etc*; but I think that the similarity in content is not about (for example) a similarity in more or less standard terms (grounds for termination, notice periods, provisions for

modification or amendment and the like) but rather a similarity in terms of what is to be done by the parties.

28. The last sentence of recital 45 seems to me to indicate that a set of "substantially interconnected" agreements constituting a project can be governed by a single contract, joint venture, production sharing agreement or other overarching legal agreement; but that is not a requirement for the set to constitute a project, nor is it necessarily an indication that the set does do so. It is simply a factor that can be taken into account.

29. It is possible that there is a connection between "substantially interconnected" (understood in the sense described above), on the one hand, and, on the other, recital 49 of the preamble to the Directive and Article 43(4) of the Directive, the latter of which provides that disclosure of payments "shall reflect the substance rather than the form, of the payment or activity concerned. Payments and activities may not be artificially split or aggregated to avoid the application of this Directive".

30. I have not been asked to advise on the consistency of the draft Reports on Payments to Governments Regulations 2014 with the Directive. However, in view of the comments set out above, I will do so anyway.

31. The draft regulation 2(5) neatly avoids the difficulty in construing the phrase "substantially interconnected" by following Article 41(4) of the Directive literally. In accordance with generally accepted principles of interpretation, the draft regulation 2(5) would be construed (and is capable of being construed) to exactly the same effect as the corresponding words in the Directive.

32. I am less happy with draft regulation 2(6). That elevates recital 45 of the preamble to the Directive into a definition of "substantially interconnected". I think that it would have been safer to have reversed the order of draft regulation 2(6). If it provided that "For the purpose of paragraph (5), a set of operationally.....giving rise to payment liabilities, is 'substantially interconnected'", it would faithfully reflect recital 45 without posing a hostage to fortune in the sense of implying that recital 45 offers a legally binding definition (which, in my view, is not the case).

QUESTION 1b: are the interpretations of "substantially interconnected contained in the Draft Industry Guidance and the CSO letter of 7 November 2014 consistent with the Directive?

Opinion:

33. In my view, the interpretation adopted in the Draft Industry Guidance is wrong. The interpretation set out in the letter dated 7 November 2014 is closer to the view that I take of the meaning of the Directive.

Reasons:

34. In paragraph 6.2(i), the Draft Industry Guidance sets out four "attribution options". The first and fourth options do not appear to be problematical for present purposes.

35. The second and third options appear to be intended to reflect the second definition of "project" (see paragraph 3 above). They are divided between "operationally and geographically integrated agreements" (Option 2) and "related agreements with substantially similar terms" (Option 3).

36. Option 2 is effectively the same as the description given in recital 45 of the Directive and set out in the draft regulation 2(6) save that it omits the third part (as to which, see paragraph 26 above).

37. Option 3 is effectively the same as recital 45 and draft regulation 2(6) save that it omits the second part (as to which, see also paragraph 26 above). Option 3 also incorporates the last sentence of recital 45. It is not clear to me why Option 2 does not also do so.

38. So far as I can see, ignoring the curious placing of the last sentence of recital 45 in the Guidance, the split between Options 2 and 3 is based on reading the description of "substantially interconnected" in recital 45 as identifying two types of "substantial interconnection". The first is to be found in the words "a set of operationally and geographically integrated contracts, licences, leases or concessions...that are signed with a government, giving rise to payment liabilities". The second is to be found in the words "related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities".

39. I do not consider that to be a correct reading of the English version of either recital 45 or draft regulation 2(6).

40. It will be observed that, in Article 41(4), the phrase "single contract, licence, lease, concession or similar legal agreements" indicates that the last category ("similar legal agreements") is a catch-all whose content is identified by the similarity of the legal agreements falling within it to the preceding categories ("contract, licence, lease, concession").

41. In recital 45, we have a parallel list: "contracts, licences, leases or concessions or related agreements". As noted above, the different language versions do not uniformly use the word "related" in relation to the last category. However, whatever the word that is used, it indicates (at least in the different language versions that I have consulted) a relationship between the last category and the preceding categories. Hence, as in Article 41(4), the natural tendency would be to read the last element in the list as relating to the earlier elements.

42. Further, the natural reading of recital 45 is to apply both the requirement indicated by "operationally and geographically integrated" and the requirement indicated by "with substantially similar terms" to the entirety of the contents of the list (rather than dividing the list up and applying those requirements, separately, to different parts of the list).

43. That is emphasised by the fact that the phrase "signed with a government" obviously applies to the list as a whole, as does the final phrase, "giving rise to payment liabilities". The authors of the Draft Industry Guidance accept that the two last phrases apply to both Options 2 and 3. It is not clear to me why, therefore, they thought that the immediately preceding phrase ("with substantially similar terms") did not also do so.

44. The interpretation of recital 45 (and the draft regulation 2(6)) adopted by the authors of the Draft Industry Guidance is untenable when regard is had to the French version of recital 45 (it also seems to me to be untenable having regard to the other language versions that I have consulted).

45. It seems to me that a dubious interpretation of the English language version of recital 45, which is excluded by another language version of the Directive, cannot be regarded as a robust or reliable reading of the recital.

46. However, as noted above, recital 45 sets out an indicative description of what is meant by "substantially interconnected". It is not, in formal terms, a comprehensive definition. Therefore, it is necessary to see whether or not Options 2 or 3 could be sustained as an independent reading of Article 41(4) of the Directive.

47. On that point, the first observation to make is that the Draft Industry Guidance should in any event set out an option that *does* reflect the actual wording of the Directive and the draft regulations. If it were thought appropriate, Options 2 and 3 could then be added with the *caveat* that the personal opinion of the authors of the Draft Industry Guidance is that they, too, could be descriptions of a "project".

48. That aside, the basic problem with Options 2 and 3 is that they are variations on recital 45 with one bit missing. It is therefore necessary to focus on the significance of the words that have been omitted.

49. Although (for the reasons stated above), recital 45 can (in my view) be regarded as indicative only, it seems to me to be problematical to take the description of "substantially interconnected" in recital 45, remove one material bit of it, and then assert that what you have is still "substantially interconnected". I accept that you could do that with a minor variation on recital 45; but if you do it with a component of the description that is material, you may not then be relying on the recital as being indicative. The recital risks becoming meaningless or misleading unless the description in the recital is taken to be an *a fortiori* example.

50. The problem seems to me to be most acute in the case of Option 3. In that option, the only bases for saying that the contracts *etc.* are "interconnected" are that: (i) they form a "set"; and (ii) they "have substantially similar terms" (the facts that they are signed by a government and give rise to payment liabilities do not, in themselves, indicate that the contracts *etc.* are "interconnected"). Apart from that, they could relate to completely different operational activities in completely different geographical areas at completely different times. I therefore fail to understand how Option 3 can be said to describe a situation in which contracts *etc.* can be said to be "substantially interconnected" by reference to any understanding of that phrase.

51. Option 2 is rather more plausible because the contracts *etc.* must "form a set of operationally and geographically integrated contracts" *etc.* On the face of it, that looks like something that would be "substantially interconnected"; and that raises the question what the phrase "with substantially similar terms" adds (always bearing in mind that the phrase may actually mean something else, such as "with fundamentally identical modalities").

52. For me, the problems with Option 2 start with its opening words: "Where payments have been attributed to agreements of the kind listed in Option 1". That option, however, starts off with the words "Where payments have been attributed to specific operational activities...".

53. It seems to me that recital 45 cannot be properly understood if it is taken in isolation from Article 41(4).

54. In Article 41(4), "project" is defined by reference to the operational activities that: (i) are governed by a particular contract *etc.*; and (ii) form the basis for payment liabilities. The second sentence of Article 41(4) puts forward essentially the same definition of "project", with the substitution of "multiple such agreements" for the single contract *etc.*, referred to in the first sentence (as long as the multiple agreements are "substantially interconnected").

55. Therefore, "project" still refers to the operational activities that form the basis for payment liabilities. What changes in the second sentence of Article 41(4) is the description of the legal instrument or instruments (the contract *etc.*) that govern the operational activities.

56. The attribution of payments to a project (referred to in Article 43(2)(c) of the Directive) is not the attribution of payments to a contract *etc.* but their attribution to operational activities having the characteristics referred to in Article 41(4).

57. Recital 45 does not change that; and is incapable in law of changing it.

58. Hence, the starting point is the particular activities that form the basis for payment liabilities. The project is then identified; and the payments are attributed to that "project".

59. Operational and geographical integration may be necessary conditions for particular activities to form one "project"; but it does not follow that, in the absence of "substantially similar terms", they actually do so.

60. For example, compare the following situations:

    a. Situation A: Country X enters into contracts with Y Ltd. whereby Y will engage in the logging of a primary forest in Area Z, located within the territory of X. Y will also open up an open cast mine in a designated part of Z, from which it will extract various minerals.

    b. Situation B: X enters into contracts with Y whereby Y will open up an open cast mine in Z, from which Y will extract various minerals. In order to open up the mine, Y must first remove the primary forest covering the area of the mine. X enters into contracts with Y enabling Y to engage in logging activities in Z.

61. In both Situations, the correct legal test to apply (all other conditions having been satisfied) is that laid down in Article 41(4): are the contracts in question "substantially interconnected"?

62. Without regard to recital 45, it would be reasonable to conclude that there are two "projects", as defined, in Situation A but only one in Situation B. That is because, in Situation A, the deforestation in Z is not connected, as to its substance, with the extractive activities that Y is going to carry out in the same geographical area: the primary forest could be logged without there being any mining activity. In contrast, in Situation B, the logging activity is preparatory to the extractive activity.

63. However, in both Situations, Y's logging and mining activities are geographically integrated, in the sense that they take place in the same location. They may well be operationally integrated: in Situation A, Y may well envisage opening up the mine as and when logging has cleared part of the area to be covered by the mine; and the same may well apply in Situation B.

64. The clinching argument, when deciding whether there is one "project" or two, might lie in the terms/modalities/requirements of the contracts *etc.*, rather than in the criterion employed in Option 2 (operational and geographical integration).[1]

65. I therefore think that Option 2 is defective, as well as Option 3, but for different reasons.

66. So far as the 7 November 2014 letter is concerned, I agree with a number of the points made in it concerning the meaning of "substantially interconnected".

QUESTION 2: could the interpretation of "substantially interconnected" in the Guidance potentially allow companies to treat agreements relating to unconnected operations as one "project" for payment reporting purposes? If so, could this put them in breach of reporting obligations under the Regulations/Directive?

Opinion:

67. As the Guidance is (in my view) misleading and wrong, companies that relied on it could well be led into error regarding what amounts to a "project", as defined. In that event, they would be in breach of the Regulations.

[1] For the sake of clarity, I should point out that the purpose of Situations A and B is to draw out the problem with Option 2. It is not my intention to express a definitive view on the question whether or not, in a Situation B case, there is only one "project". In order to reach such a conclusion, it would be necessary to look at all relevant facts and matters.

Reasons:

68. The reasons for criticising the accuracy of the Draft Industry Guidance are set out above. The draft regulations reflect the Directive rather than the Guidance (although I have also made some adverse comments on the draft regulations above); and would in any event be construed, wherever possible, so as to be consistent with the Directive.

69. It follows that, to the extent that the Guidance does not reflect accurately the law as set out in the Directive (whose legal effects will be felt in the United Kingdom through the national implementing regulations), a company acting in accordance with the Guidance would run the risk of being found to be in breach of its obligations under the national implementing regulations.

70. A private sector company would not normally be regarded as acting in breach of the Directive if it followed the Guidance and was led into breaching the national implementing regulations because directives do not impose obligations directly on private sector entities; any obligations imposed on private sector entities flow from the national implementing regulations (construed in accordance with the relevant directive).

QUESTION 3: what would the implications be if a version of the Guidance is adopted which encourages reporting which does not satisfy the Directive requirements: for example, could BIS be accused of an infringement of the Directive, or could this impact BIS' ability to prosecute breaches of the Regulations? Even if the Guidance does not receive formal endorsement by BIS, could its existence lead to any form of censure for the UK Government?

Opinion:

71. It would not be lawful or appropriate for BIS to support in any way, or appear to support, guidance that does not satisfy the requirements of the Directive. That would potentially involve a failure to achieve the result intended by the Directive (contrary to the Directive and to Article 288 of the TFEU) and a breach of Article 4(3) of the TEU, exposing the United Kingdom to infringement proceedings commenced by the Commission. It could also have an effect on the domestic enforcement of the implementing regulations. The mere existence of the Guidance does not engage the liability or responsibility of the United Kingdom; but the inaction of the Government in the face of industry guidance that is controversial or wrong could be problematical.

Reasons:

72. The Draft Industry Guidance states on the first page that it "does not necessarily reflect the views of all OHP and ICMM members" and has been prepared "by industry". On the first page, there is a space enclosed by square brackets that is intended to be filled by a statement that the Guidance has been endorsed by BIS. On page 2 of the Guidance, there is a statement (also in square brackets) that the Guidance has been "reviewed" by BIS.

73. In the absence of the endorsement of the Guidance by BIS, or some other indication that it has been blessed, approved or cleared by BIS, the Guidance simply reflects the view of some part, but not necessarily the whole, of "industry". A company that chose to follow the Guidance would be doing so at its own risk.

74. If, for example, the Guidance took its present form and a company followed the interpretation of "substantially interconnected" adopted in the Guidance (which I consider to be wrong), that would not relieve the company of its legal obligation to make a report in compliance with the Directive and the national implementing regulations (as adopted).

75. On the other hand, reliance on the Guidance could be relevant to a prosecution under, for example, draft regulation 16. Such a prosecution depends upon the person concerned having acted "knowingly or recklessly". It might be argued that, if the person concerned had acted on the basis of an erroneous part of the Guidance, he was not acting "knowingly or recklessly". The strength of that argument would depend upon the extent to which the Guidance was, or appeared to be, at variance with the Directive and the national implementing regulations, the extent to which doubt had been raised publicly about the consistency of the Guidance with the Directive and the implementing regulations (that would include the extent to which BIS had or had not endorsed or approved the Guidance), and whether or not the person concerned had taken independent legal advice.

76. In principle, as the Guidance is the result of a private initiative, its existence does not engage the liability or responsibility of BIS: private persons are free to express their own views as to the meaning of legislation.

77. The position would change if BIS gave, or appeared to give, its support to the Guidance in some way (such as by "endorsing" the Guidance). In that event, should the Guidance be wrong in a material respect, BIS might find that a prosecution could not proceed successfully or at all: the defendant might say that (to use the example of draft regulation 16) he could not have acted "knowingly or recklessly" by following guidance that BIS itself had endorsed or that a prosecution would be unfair (and could not be maintained) if brought in relation to conduct that was, or appeared to be, mandated by BIS.

78. If BIS lent its support to an interpretation of the Directive that was erroneous, that could also be regarded as a failure by the United Kingdom to implement the Directive (contrary to its duties under Article 288 of the TFEU and the Directive itself) or as a breach of Article 4(3) of the TEU: the implementation of a directive involves achieving the result intended by it within the Member State concerned; and that involves not just transposing the provisions of the directive into national law but also securing their full and proper observance. Accordingly, the United Kingdom would be exposed to the commencement, by the Commission, of infringement proceedings. Such proceedings could be commenced by the Commission on its own initiative or following a complaint submitted to the Commission by an interested person.

79. As noted above, private persons are free to express their own views as to the meaning of legislation. Governments are not obliged to correct each and every personal expression of opinion of the meaning of legislation, with which the Government disagrees. However, there comes a point at which silence or inaction on the part of the Government becomes problematical so far as a Member State's obligations under Article 4(3) of the TEU are concerned.

80. Where the Government is confronted with a situation in which private persons are not complying with their legal obligations, the Government is responsible for taking appropriate action to ensure that the law is observed. By parity of reasoning, where the Government is made aware of a course of action undertaken by private persons, however well-intentioned, that risks leading to a failure to ensure that the law is observed, the Government is also (in my view) obliged to take appropriate action. That is (amongst other things) what Article 4(3) of the TEU requires.

81. Accordingly, if the Government is made aware that "industry" is drawing up guidance designed to influence the way in which companies comply with their legal obligations, the Government needs to be careful of its position.

82. Where the proposed guidance adopts a possible interpretation of the law (and is not, therefore, clearly wrong), the Government has a range of possible actions that it might consider, including publishing guidance of its own and publicly refraining from "endorsing" the guidance in question. Where the proposed guidance is clearly wrong, the Government may be called upon to make its position known more forcefully in order to prevent the occurrence in the future of unlawful conduct (for the reasons stated above, the Draft

Industry Guidance is clearly wrong in relation to its approach to "substantially interconnected").

83. In all cases, the least that would be expected is that the Government would inform the relevant industry (possibly by means of a letter sent to the representative body of the industry for dissemination to its members) that companies would be expected to take their own legal advice on compliance with the legislation and not just rely on industry guidance.

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