

UK Bribery Act What next?

The UK Bribery Act came into force on 1 July 2011, and as a result the UK now has one of the most stringent anti-corruption regulatory regimes in the world. What should organisations now be doing to ensure they develop and maintain a fit for purpose anti-bribery and corruption programme?

The summer months might typically constitute something of a slow down for UK businesses, yet it appears there has been no respite for the global enforcement agencies. Over the months since July 2011 a number of proceedings have been settled with organisations that have allegedly made improper payments to government officials and other potential bribery related incidents.

Although we have yet to see a corporation prosecuted under the UK Bribery Act, it is evident from recently settled cases at home and overseas that preventing bribery and corruption is certainly front of mind for the UK authorities. We are seeing many companies implement changes and enhancements to policies, procedures and processes to enable them to demonstrate adequate anti-bribery and corruption procedures. That said, we note that many organisations have yet to respond fully to the changing legislation and remain vulnerable as a result.

Below we explore how organisations are responding and offer some thoughts on where organisations should focus going forwards to prevent bribery and corruption.



Initial impact

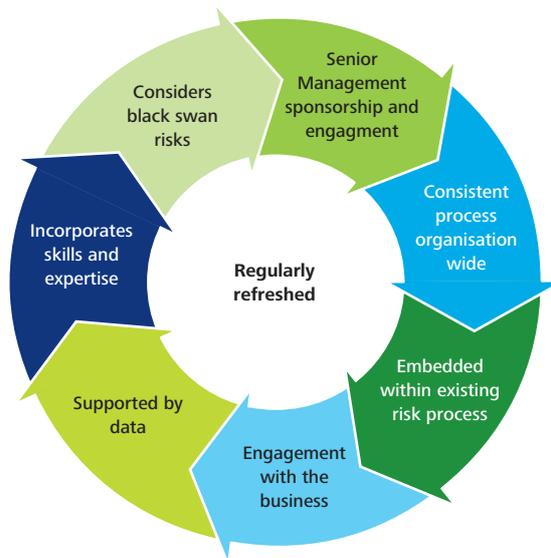
The Ministry of Justice's (MOJ) guidance detailed six principles to guide organisations in putting in place "Adequate Procedures" to prevent bribes being paid on their behalf.

The guidance, issued on 31 March 2011, addressed many of the areas of concern voiced by the business community, including issues concerning corporate hospitality and entertainment; the obligations of businesses to manage bribery risks within their supply chains; the impact of share listings in the UK; and the treatment of joint ventures and subsidiaries in the context of the actions of "associated persons". The emphasis on proportionality was clearly welcomed and has enabled companies to better tailor their response to the new legislation.

Bribery and corruption risk assessment

Companies have generally accepted they need to take positive and tangible action steps in order to assure themselves of their ability to comply with the Act. Typically, we have seen organisations embrace the requirement to conduct a bribery and corruption risk assessment. A number of approaches can be applied and in Figure 1 we note the characteristics of an effective risk assessment.

Fig 1. Characteristics of an effective bribery and corruption risk assessment



An effective risk assessment requires:

- the backing of senior individuals in the organisation to demonstrate its importance, emphasise the organisation’s zero tolerance to bribery and to embed the control within the business;
- input from the various layers of management and different operations and geographies – to ensure all territories and areas of vulnerability are considered and to enable those with experience on both a day to day level and in senior roles to participate;
- ownership from an individual(s) with the right skills, business and anti-bribery subject matter knowledge to identify the risks in the organisation; and
- the capability of surfacing the “black swan” risks – high impact, low likelihood bribery risks.

Anti-bribery and corruption training

Additionally, we see that organisations have generally commenced, if not already completed, general awareness training for their employees. Some have extended this training to third parties operating on their behalf – though this is, in our experience, less common and many organisations are still in the planning stages for this element of their programme. General awareness training tends to cover the key provisions of the Act; how this impacts the organisation and its employees and then delves into tailored elements relevant to the business operations and its specific anti-bribery and corruption policies and procedures.

Organisations often use e-learning as the basis of their general awareness training – and as a mechanism which accommodates large staff numbers and can be built into existing learning platforms this offers a good foundation for awareness raising and communication of key messages. The most effective training does, however, necessitate inclusion of scenarios and case studies, ideally tailored to the organisation. Whilst e-learning can accommodate these, our experience indicates that face to face training, which generates real time discussion and Q&A through consideration of real life examples relevant to the organisation, is more effective in bringing key anti-bribery messages to life.

Facilitation payments

This remains an area where organisations continue to grapple with the challenges inherent in implementing a zero tolerance policy. Whilst it’s probably still too early for companies to have much in the way of evidential data to support or challenge the operational effectiveness of a stated zero tolerance policy, this is an area where the cultural change required to effectively embed such a policy will take time. Training, monitoring and regular communication to reinforce the message are key to changing behaviours and ensuring that staff understand the consequences of violating company policy in this respect.

We see businesses, particularly those most vulnerable with overseas operations in high corruption risk locations, actively committed to eliminating the practice of making facilitation payments over a period of time and taking deliberate and demonstrable steps to underline their commitment. In addition, these organisations are also making clear policy statements and putting in place appropriate authorisation and communication channels for employees faced with situations when payments of this nature are requested or expected.

But what next?

As noted above, our experience has shown that companies are striving to attain compliance around bribery risk assessment and training. On policies and procedures, they are making progress, enhancing existing policy frameworks, introducing an anti-bribery and corruption policy or equivalent and revising current policies such as gifts and hospitality and HR procedures to enable compliance.

Companies continue to face challenges, however, including in the operationalisation of these policies and effectively monitoring compliance with them.

Effective anti-bribery and corruption due diligence on associated parties

An area of Adequate Procedures where companies are still evolving their approach is in relation to Principle 4: Due Diligence. Examples of situations where due diligence may be necessary include:

- commencement of a new business relationship/partnership;
- formation of a joint venture or other affiliation
- retention of an agent or third party to perform services on behalf of the organisation; and
- merger and/or acquisition activities.

Furthermore, for many organisations it may be necessary to retrospectively apply due diligence to existing associated party relationships.

Companies are augmenting their existing due diligence to further consider the ethics and reputation of the third parties with whom they are dealing. In addition, additional anti-bribery and corruption clauses are being added to template contracts and often include a requirement for the third party to explicitly confirm their compliance with the Act and to disclose to the organisation any instances of bribery identified

Particular challenges exist around legacy third party relationships. For example:

- determining whether the third party is performing services on behalf of the organisation and could be deemed to be paying bribes for the organisation;
- prioritising third party relationships according to their level of inherent bribery and corruption risk;
- deciding what due diligence is appropriate;
- investigating and resolving "red flags" which arise from due diligence; and
- deciding whether it is appropriate to re-open contractual negotiations in order to supplement existing agreements with relevant anti-bribery clauses.

Additionally, actually conducting the diligence required, whilst not technically complex, can be operationally challenging where information and data is restricted, multiple languages are required, for example in high corruption risk countries; when staff have not received training in ethical due diligence and/ or when staff conducting the due diligence have had infrequent or no exposure to bribery and corruption "red flags" or incidents.

It is very important to ensure that due diligence in the organisation is conducted consistently regardless of geography and that a clear escalation channel is in place so that where "red flags" arise appropriate additional steps are taken to investigate and resolve these before contractual commitments are made.

Ongoing monitoring and compliance

Implementing an effective anti-bribery programme is not a one-time activity. The MOJ Adequate Procedures guidance recognises this by emphasising the importance of "monitoring and review" in Principle 6. In practical terms this can take many forms, but at its simplest necessitates the need for organisations to build a proportionate, ongoing mechanism to keep bribery and corruption risk prevention in management's field of vision.

Recognising that the Act has only recently been implemented, we expect that organisations should be considering now what key risk indicators they need to assess the effectiveness of their programme and anti-bribery and corruption controls. Going forward, placing bribery and corruption on the agenda for management reviews, building in measures into ongoing procedures and business decision making processes, refreshing the risk assessment periodically and, when exceptional circumstances arise (e.g. when moving into new markets) are all requisite elements of an effective monitoring programme. Certainly we would expect that Internal Audit should have bribery risk on their work plan and be planning and conducting specific audits to provide the organisation with assurance that anti-bribery controls are operating effectively.

We expect that organisations, certainly larger ones with diverse and remote operating locations, will look to augment existing self assessment and continuous controls monitoring activities to assist them in early detection of control weakness in the anti-bribery controls framework.

How Deloitte can help

Our anti-bribery specialists at Deloitte have helped some of the world's highest profile organisations implement bribery and corruption procedures. From our detailed appreciation of what it takes to implement an anti-bribery programme, and our analysis of the MOJ guidance we have the capability to assist your organisation in developing adequate procedures including:

Risk assessment

We can support your organisation in the performance of your risk assessment including performing both individual unit risk assessments and organisation wide assessments. Our risk assessment methodology is highly flexible to your organisation's circumstances and explores all of the dimensions that the MOJ have highlighted.

Action plans

Supporting you in defining and delivering action plans to develop your anti-bribery procedures, we can:

- analyse the areas where the balance of risks and controls merits further anti-bribery procedures to be put in place;
- provide you with expertise and advice in relation to the delivery of your anti-bribery programme; and
- identify elements of good practice to inform your anti-bribery procedures.

“Adequate Procedures” Diagnoser

We have a tool consisting of a convenient and quick set of diagnostic questions which are grounded in the MOJ Adequate Procedures principles which we can use to help you assess your anti-bribery procedures and controls. The tool breaks these principles down into more granular and measurable factors that allows us to assess the consistency of your organisation’s control environment with the principles contained in the guidance.

Anti-bribery and corruption training

We have a range of training solutions that are capable of meeting the needs of your organisation including:

- awareness training (targeted for general distribution);
- case study examples (for those seeking enhanced understanding);
- practitioner training (targeted for those in high risk roles);
- top level management training;
- board training; and
- e-learning.

Controls testing

Our Enterprise Risk Services practice has significant experience of developing and testing control frameworks for ethical and regulatory compliance. Working with you, we can use our knowledge, skills and expertise to define and deliver tailored testing programmes for your bribery prevention controls.

Business intelligence services

Our Business Intelligence team are able to obtain information relating to the background and reputation of potential joint venture partners, sales agents or other business partners who may fall into the definition of associated parties.

Forensic data analytics

Our Forensic Data Analytics team has a number of relevant tools and techniques which are used to assist clients in their anti-corruption efforts. These include:

- Data mining and interrogation capabilities that can highlight potentially problematic transactions quickly and efficiently .
- Online survey tools that can quickly gauge the state of awareness of staff with a company’s anti-corruption policy and related procedures and controls as well as highlight potential corruption risk areas.

Transactional due diligence

Our corruption specialists have worked with both buyers and sellers to identify corruption risks as part of the due diligence process. The results of such work can influence deal price and also allow acquirers to mitigate identified corruption risks both pre and post acquisition.

Forensic investigations

Our corruption and forensic accounting specialists have deep experience of conducting investigations and producing reports that are responsive to the needs and expectations of regulators and enforcement authorities.

Contacts

If you would like additional support and insight on this topic please speak to any of our experts below.

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