
We set out in this note our suggestions as to the “adequate procedures” that a company may consider adopting as part of its process of updating compliance procedures in order to protect itself against the new offence of failure of commercial organisations to prevent bribery.

Introduction

Section 7 of the Bribery Act 2010 (the Act) provides that the new corporate offence is committed if:

(i) an “associated person” bribes another person intending to obtain or retain business or an advantage in the conduct of business for the company; and

(ii) there are no “adequate procedures” in place designed to prevent bribery.

“Associated person” is broadly defined as any person performing services for or on behalf of an organisation, including an employee, agent, subsidiary or joint venture. Whether someone is an associated person will be determined with reference to all the relevant circumstances and not simply in reliance on the nature of the relationship. A commercial organisation which has been charged under section 7 may successfully defend such a charge if it had in place “adequate procedures” designed to prevent the bribery. The commercial organisation will have to establish, on the balance of probabilities, that “adequate procedures” were in place.

“Adequate procedures” is not defined in the legislation but section 9(1) requires the Secretary of State to publish guidance on how “adequate procedures” should be considered.

It should be noted that the Act is not yet in force. The Bill received Royal Assent on 8 April 2010 and is expected to come into force in April 2011. For a more detailed note on the Act and its provisions, please see The Bribery Act – Be prepared.
procedures” should be interpreted. Final guidance has not yet been published but the Ministry of Justice issued a Consultation Paper on 14 September 2010 seeking views on proposed guidance. The consultation will end on 8 November 2010 with the intention that the Ministry of Justice will publish guidance early in 2011 and in advance of the Bribery Act coming into force in April 2011.

The Consultation Paper repeats earlier indications that the guidance will focus on six key principles. Lord Bach, the Parliamentary Under Secretary of State, also produced additional guidance on the meaning of “adequate procedures” prior to the Act receiving Royal Assent, which highly recommended anti-bribery strategies published by Transparency International and the Global Infrastructure Anti-Corruption Centre. In addition, certain specific recommendations were made by Lord Woolf following his review of BAE Systems plc’s ethical policies and processes. We have summarised below useful procedures from each of these sources, together with the Ministry of Justice’s six key principles. Based on our experience in this area, we have focused on procedures which we consider to be appropriate and relevant.

Suggested procedures

It is important to adopt a principles based, flexible approach to adequate procedures. There is no rigid formula which will guarantee that the requirement of an adequate procedure is met and a rigid, rules based approach is frowned upon by regulators. As the Ministry of Justice’s Consultation Paper states, the six principles are designed to be, “of general applicability across all sectors and for all types and size of business. It is not intended to be prescriptive or standard setting, or impose any direct obligation on business”.

We describe below the six key principles, together with recommended practical strategies to achieve each of the principles.

1 Risk assessment and management

1.1 Risk assessment and mitigation procedures

Clear risk management procedures should be implemented that regularly and comprehensively assess the nature and extent of a risk of corruption in the business. Such assessments can then be used to develop, implement and maintain appropriate risk mitigation policies and procedures within the organisation, including training as appropriate (see further section 4 below).

---

6 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010.
10 Global Infrastructure Anti-Corruption Centre, Anti-corruption programme for companies, 8 May 2010.
11 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p.4.
1.2 **Ongoing risk review and monitoring**

Ongoing risk assessments should also be undertaken whereby the commercial organisation continually assesses risks and mitigates against them as the organisation evolves and external circumstances change.

2 **Top level commitment to prevent bribery**

2.1 **A statement of commitment to counter bribery in all parts of the organisation’s operations**

The commercial organisation should have a written commitment by which it confirms that it will act fairly, honesty and openly in all of its dealings, thereby adopting a zero tolerance attitude to bribery. The statement should state that it is applicable to all employees including management and should provide details of the sanctions to be imposed if an employee is found to have acted in contravention of the programme.

2.2 **The organisation’s management structure and its commitment against bribery**

The board of directors should take responsibility, and be seen to be taking responsibility, for establishing, operating and maintaining a culture in the commercial organisation in which bribery is unacceptable. The board should ensure that this zero tolerance approach to corruption is siphoned down across all levels of management and throughout the organisation. Furthermore, this message should be repeated on a regular basis to all staff and business partners so that they are aware of their continuing obligations.

In certain industries it may also be appropriate for the board to establish a non-executive committee specifically to oversee and report on standards of ethical business conduct and to appoint or nominate a senior compliance manager with responsibility for day-to-day oversight and with direct access to the chief executive and the board.

2.3 **Decision making**

An assessment of ethical and reputational risk should precede all business decisions. In situations where a corruption risk is identified, any decision-making should be undertaken by an appropriately senior person.

2.4 **The organisation should work with other stakeholders in the industry to reduce corruption**

Some of the available guidance suggests that an organisation should encourage initiatives that support the establishment of anti-corruption practices in the market, including collaboration between stakeholders in both the private and public sectors to help reduce corruption in the relevant

---

12 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p. 11.
13 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p. 14.
14 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p. 14.
industry. This may be done on a local level, and/or from a more national perspective.

3 Due diligence and relationships with business partners

3.1 Due diligence

Due diligence should be performed by the commercial organisation prior to entering into new relationships with business partners (such as joint venture partners, sales agents, marketing consultants and other such intermediaries) in order to assess any potential corruption risks. Consideration should also be given to whether existing relationships were subjected to sufficient due diligence at the outset and, if not, further due diligence may need to be carried out by the commercial organisation.

The scope of due diligence should extend to the country in which the potential new business will be conducted, the potential new business partner and the proposed business project opportunity. We anticipate that, in many cases, the relevant business unit will be able to carry out due diligence quickly and cheaply by searching publicly available information. In certain circumstances (such as where business is being carried out in a high risk jurisdiction or there is little public information available about a proposed partner), it may be appropriate to retain a third party investigator to conduct the due diligence. A number of our clients retain the likes of Kroll, Risk Analysis Group and World-Check to assist with due diligence.

The red flags to look out for in due diligence are, in summary:

• warning signs relating to location, for instance where the proposed partner has no physical presence in the relevant country or where business is to be transacted in a country with a poor corruption record;

• transactional warnings, such as transactions which do not make economic sense or which are opaque and difficult to understand;

• financial warnings, such as where the business partner requires the payment of cash, offshore payments or unusually high payments; and

• general warning signs about the business partners, such as suspiciously close ties to government officials, previous allegations of corruption or unethical behaviour or a lack of proportionality between work done and compensation.

3.2 Relationships with business partners

Where the commercial organisation does not have effective control over joint ventures and business partners, it should encourage them to establish equivalent anti-corruption programmes within their businesses. If the organisation is not successful in convincing a business partner to establish an anti-corruption programme, careful thought needs to be given as to whether

---


that partner could be an “associated person” under the Act. For the reasons given above, we would advise against doing business with an “associated person” which does not have an effective anti-corruption programme in place.

In any event, the commercial organisation should monitor its business partners for possible corruption. In the event that the organisation discovers corruption in the practices of its business partners, it should ensure that it has methods to either correct the deficiency, sanction the business partner or terminate the arrangement.17 This can be achieved through appropriate language in contracts, such as anti-corruption warranties and undertakings, obligations to keep proper books and records, and specific rights of audit.18

4 Clear, practical and accessible policies and procedures

4.1 Policy and Procedural Documentation

The commercial organisation should have a clear ethical programme which is published internally and on its website, and on which all employees receive appropriate training.19 The programme should include a specific anti-bribery policy which makes clear the restrictions and requirements imposed by the Act. The formality, scope and amount of resources expected to be devoted to such a programme will depend on the nature of the risks that a commercial organisation faces in its business. A risk assessment will therefore help a commercial organisation to identify such risks and to develop effective anti-bribery policies and procedures in response to them.

A commercial organisation may choose to adopt a code of conduct (which may also form part of an employee’s employment contract) which explains the standard of business conduct required from all employees.

It is also recommended that such organisations adopt a programme that incorporates specific policies and procedures concerning the following topics:

- Commercial control policy and supply chain management20

The commercial organisation should encourage any subcontractors or other parties with which it transacts to establish equivalent anti-corruption policies. The commercial organisation should also monitor the execution of contracts by subcontractors or other parties to minimise the risk of corruption occurring.

This is particularly important where a third party could be an “associated person” under the Act and the business in question presents a corruption risk. In such a case the commercial organisation should carefully vet the third party’s credentials (including any governmental links) and insist on the third party implementing the commercial organisation’s anti-corruption policies. In particular, sales consultants, agents, intermediaries and other parties who

may be paid on a ‘sales commission’ or similar basis, should be carefully vetted and a strong business case for their retainer should be established.

- **Facilitation payments policy**

  Facilitation payments, which are small payments made to secure or hasten performance of an obligation which the payee is legally obliged to fulfil, are illegal under the Act. The commercial organisation should have in place a policy to identify and eliminate such payments.

- **Financial control policy**

  Financial controls should be implemented to minimise the risk of a corrupt act being committed by or against the organisation. Such controls should aim to identify unusual payments, such as payments that are not made in accordance with the terms of relevant contracts, requests for cash or disproportionate expense claims. The controls should be reviewed by the internal audit function.

- **Gifts and hospitality policy**

  The commercial organisation should establish and maintain a policy which either prohibits the giving and receiving of gifts and entertainment, or monitors and places limits upon such activities. A central register should be implemented and the aggregate spend on gifts and hospitality should be carefully reviewed and monitored.

- **Policy concerning political contributions, charitable contributions and sponsorships**

  Direct or indirect contributions should not be made to political parties or individuals in order to obtain a business advantage. It may also be appropriate to consider implementing specific rules relating to the use of political lobbyists and to carry out due diligence to ensure that any contributions to charity or other sponsorships are not used to mask bribery.

- **Employment procedures**

  The commercial organisation should:

  (i) vet prospective employees to take a view on whether they are likely to comply with the commercial organisation’s ethical policies;
(ii) require employees to declare conflicts of interest and maintain a register of such conflicts;26

(iii) include anti-corruption obligations and appropriate penalties in employment contracts;27 and

(iv) establish disciplinary procedures to enable the organisation to take suitable action against employees who have breached the code of conduct.28

4.2 Support and operational procedures

Existing procedures, such as financial and auditing controls, performance appraisals and selection criteria may be able to be adapted so as to become effective bribery deterents. It is also recommended that commercial organisations should consider areas such as procurement and supply chain management as appropriate mechanisms by which bribery can be tackled.

4.3 Management of incidents of bribery

The commercial organisation should be open and transparent about its policies and about any investigations or actions taken to deal with breaches of policy. This should involve consideration of whether senior management should be appointed to oversee a commercial organisation’s approach towards ensuring good business practices. Consideration should also be given to communicating information to staff and third parties as regards the sanctions process if a breach of the programme is identified.29

5 Effective implementation

5.1 Implementation Strategy

The commercial organisation must have in place a clear and effective procedure by which it can implement its anti-bribery policies and procedures, ensuring that they are embedded in the culture and environment of the firm. This process should also consider the need to develop policies and procedures to reflect practical business issues.

The commercial organisation may wish to consider adopting an implementation strategy setting out how the programme will be communicated to employees and implemented across the organisation. This should include consideration of both internal and external communications, training needs, reporting lines, and arrangements as regards monitoring compliance, and reviewing and updating policies and procedures.

---

26 Global Infrastructure Anti-Corruption Centre, Anti-corruption programme for companies, 8 May 2010.
29 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p.14.
Strategies should also be put in place to monitor compliance and mechanisms by which sanctions are imposed for breaches of agreed policies and procedures.

5.2 **Internal communication**

The commercial organisation should ensure that the programme is implemented in all business entities over which it has effective control or which are or may be considered to be “associated persons”, and it should encourage any entities with which it has significant investments to establish equivalent programmes. The board and senior management should also demonstrate visible and active commitment to the implementation of the anti-corruption programme.

In some sectors it may also be advisable for human resources practices, such as recruitment, training, performance evaluation and remuneration, to be linked to the organisation’s commitment to the programme.

Systems may need to be established whereby all members of senior management and all of the organisation’s employees who are involved in sectors such as sales, marketing, finance, compliance and internal audit, are informed about the programme and receive detailed training as to its application. Such training should be well resourced and periodically repeated to ensure relevance and to provide assurances that all staff are familiar with the policies.

5.3 **External communication**

The commercial organisation should establish mechanisms by which information about the programme is relayed to external partners. This may involve information on the organisation’s website, and direct communications with key players and business partners, and should include information about the sanctions which may be imposed if they fail to comply.

6 **Monitoring and review**

6.1 **Internal monitoring and review mechanisms**

To enable continuous improvement of the programme, the commercial organisation should develop feedback mechanisms and other internal processes to ensure that the adequacy and effectiveness of the programme remains optimal. Such reviews should be conducted on an ongoing basis to ensure that anti-bribery measures are up-to-date and reflect business changes, and may include periodic reporting to senior management or appointed individuals.

---


32 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p.17.
6.2 **Transparency**

To ensure transparency it is important that the commercial organisation keep proper books and records available for inspection, and reviews and audits accounting and record keeping practices on a regular basis. Furthermore, specific strategies need to be implemented as regards monitoring the implementation of anti-bribery procedures in overseas offices and with business partners.  

6.3 **External verification**

In some sectors, organisations have decided to obtain external verification of the organisation’s policies and systems. The results of such review should be used to revise the code of conduct and policies as appropriate. External verification can also play an important role in enhancing credibility with business partners or in upholding market confidence in the organisation.

---

33 Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010), September 2010, p.17.
Author: Satindar Dogra

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2010

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP together with a list of those non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers. Please refer to www.linklaters.com/regulation for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at marketing.database@linklaters.com.