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Risk management issues in the context of bribery and corruption and how to deal with them

What is bribery?

The Bribery Act 2010 (the "**UKBA**") defines a bribe as any advantage given (or received) to influence a person in the carrying out of a function, usually connected with their work or role. The intention of the bribe must be to influence the 'bribee' to carry out that function improperly, or to obtain some form of benefit or advantage from a public official. It can be delivered directly or indirectly.

The UKBA sets out five broadly-defined key offences:

1. Active bribery (offering or giving a bribe to another) – an advantage offered to the recipient to do something improper in the discharge of their functions (or to reward them for the same);
2. Passive bribery (accepting or requesting a bribe) – an advantage accepted for carrying out a function improperly;
3. Bribery of a foreign (non-UK) public official – an advantage intended to influence a public official to help business in any way;
4. "Consent or connivance" by a director or senior company officer in bribery by a company; and
5. Failure by a commercial organisation to prevent bribery on its behalf by its associated persons.

How can firms ensure there are robust anti-bribery systems and controls in place?

The Ministry of Justice (the "**MoJ**") has issued six principles for bribery prevention on which organisations ought to focus to ensure their systems and controls are robust. These are helpful in managing an organisation's bribery and corruption risks. These are set out below with a brief description of what organisations can do to ensure their anti-bribery and corruption controls and procedures do not fall foul of the legal standard.

(1) Proportionate procedures

Organisations must ensure that their procedures to prevent bribery are proportionate to the bribery risks they face, and to the nature, scale and complexity of the organisation's activities. The MoJ notes that compliant policies are likely to include certain common elements such as the organisation's commitment to bribery prevention, a general approach to mitigation of specific bribery risks, and an overview of its strategy to implement its bribery prevention policies.

(2) Top level commitment

Organisations are required to ensure that members of their senior management are committed to the organisation's prevention of bribery, as they are in the best position to foster a culture of integrity where bribery is unacceptable. Procedures around this might involve communication of the organisation's anti-bribery stance and an appropriate degree of involvement in developing anti-bribery policies.

(3) Risk assessment

This may form part of a bigger risk assessment or it may be a standalone bribery and corruption risk assessment. This may also involve the typical procedures that fall within the organisation's due diligence in the context of risk mitigation and know-your-client or KYC.

(4) Due diligence ("**DD**")

The purpose of this principle is to encourage the implementation of proportionate DD measures to prevent bribery when, for example, entering business relationships. It is noted that DD should be conducted using a risk-based approach. This may include an

assessment of common risk areas and subsequent assignment of a level of risk and corresponding extent of DD.

Commonly encountered risks include country, sectoral, transaction, business opportunity, and business partnership risk. Such risks, coupled with internal deficiencies, can add to the level of risk faced by an organisation. Commonly encountered internal deficiencies that add to the level of risk include: deficiencies in employee training, skills and knowledge; a bonus culture that rewards excessive risk taking; lack of clarity in the organisation's policies and procedures for matters such as hospitality and charitable contributions; and lack of clear anti-bribery messages from top-level management. Having sufficient DD measures in place to identify such commonly-encountered internal and external risks will help in the firm's ability to mitigate these risks adequately and to develop robust anti-bribery and corruption systems and controls.

(5) Communication and training

These are important in deterring bribery and corruption, and enhancing awareness and understanding of the relevant procedures and commitment to anti-bribery and corruption practices. The MoJ has separated communication into internal and external. Internal communications should communicate 'tone from the top', as well as focus on the anti-bribery and corruption policies, procedures and consequences for employees, whereas external communications should include a statement of the organisation's anti-bribery and corruption policy or code of conduct.

On training, this should be mandatory as part of the induction process for new employees or agents of the organisation but also periodically given to individuals in certain positions. Training on 'speak up' procedures will also be important.

(6) Monitoring and review

Ongoing monitoring of an organisation's anti-bribery policies and controls are key to ensuring continued commitment to tackling its bribery and corruption risks to ensure that there is continued risk identification, risk assessment and risk mitigation. This may involve both internal and external review mechanisms, to include staff surveys, periodic reviews and reporting to senior management, or seeking external compliance standard

certifications (though it is key to bear in mind that external certifications may not always bring the organisation's procedures within the definition of "adequate" under section 7 of the UKBA).

Comment

It should be noted that whilst the MoJ has stated that an organisation's anti-bribery and corruption procedures should be informed by these principles, they are not prescriptive, and in deploying these principles, organisations ought to tailor their application to their specific needs based on the organisation's size and nature. Managing an organisation's risk is crucial, especially in the light of the corporate offence of failing to prevent bribery. For firms regulated by the Financial Conduct Authority ("**FCA**") or the Bank of England ("**BoE**"), such failures will result in hefty financial penalties as demonstrated by the FCA's fine on Credit Suisse International, Credit Suisse (Europe) Ltd and Credit Suisse AG (together "**Credit Suisse**") discussed below.

On 19 October 2021, the FCA imposed a financial penalty of £147,190,200 on Credit Suisse for shortcomings in their financial crime systems and controls, which included the systems identifying, assessing, and mitigating fraud, bribery and corruption within its Emerging Markets business.

These and other weaknesses came to light because of two infrastructure projects in Mozambique, for which Credit Suisse provided two loans amounting to over \$1.3bn. The FCA found that Credit Suisse had sufficient information from which it should have appreciated that the transactions were associated with a higher risk of bribery and corruption. Although Credit Suisse did consider the relevant factors associated with a higher risk, the bank consistently gave insufficient weight to them individually and failed adequately to consider them holistically. The criticism also included lack of engagement by senior individuals within the Emerging Markets business, which the FCA found contributed to the failure adequately to scrutinise these transactions. It also found that three Credit Suisse employees (including two Managing Directors) took advantage of the systemic weaknesses by accepting kickbacks of around \$53m from a contractor in exchange for agreeing to help secure approval for the loans more favourably for the contractor whilst concealing material facts from colleagues. Mozambique has subsequently claimed that the minimum total of bribes paid in connection with the contractor's corrupt scheme was around \$137m.

This case (which is an example reflective of others in the sector) highlights the importance of having adequately robust risk management systems to identify, assess and mitigate the risk of bribery, and the extent of the financial penalties for deficient anti-bribery and corruption systems and controls. This case (which is an example reflective of others in the sector) highlights the importance of having adequately robust risk management systems to identify, assess and mitigate the risk of bribery, and the extent of the financial penalties for deficient anti-bribery and corruption systems and controls.

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We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

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