FORENSIC

Doing business under the UK Bribery Act

Survey 2012

kpmg.com/in
Executive summary

Following several law commission papers, a first draft of the Bribery Bill was published in March 2009. After extensive debate, the Bill received royal assent on 8 April 2010 and finally came into force on 1 July 2011 marking the biggest overhaul of UK Bribery laws in over a century.

The Act, which is wider in scope than the US Foreign Corrupt Practices Act, 1977 (FCPA), reforms the criminal law of bribery, making it easier to tackle the offence proactively in the public and private sectors. While the Ministry did publish a “Guidance” in March 2011 and, at the same time, joint guidance on prosecutorial decision-making under the Act (the “Prosecution Guidance”), was published by the Directors of the Serious Fraud Office (SFO) and Department for Public Prosecutions (DPP); organizations were still left with a few grey areas to tackle.

With the Act having far-reaching implications, our survey is an attempt to understand how companies are tackling the various aspects of the law. Various issues like the risks associated with third parties, the element of facilitation payments, level of commitment required by the Board, Directors personal implications, adequate procedures and the extent of their implementation are just some of the points that have been covered in the subsequent pages.

Where is the gap?

While majority of our respondents have expressed that they have adequate anti-bribery and corruption (AB&C) policies in place along with an effective communication mechanism that expresses Zero Tolerance towards corrupt activities, it is important to note that a written policy on gifts and hospitality and an adequate training mechanism feature low on the execution level. Companies need to be made more aware of what constitutes an efficient AB&C program. What might be adequate in their eyes, is definitely not sufficient when pitted against the requirements under the law. While organizations are now more aware, all the basic elements of a compliance program however are not in place.

| Have adequate anti-bribery and corruption policies | 91% |
| Have a written policy on gifts and hospitality | 69% |
| Have an effective communication mechanism that expresses Zero Tolerance towards corrupt activities | 91% |
| Have an adequate training mechanism | 53% |
The tricky ‘Third Party’

Organizations need to realize that the risk of non-compliance increases when third parties are involved since they can be held responsible for the ‘act’ of non-compliance conducted by the third party. With third party intermediaries having been identified as posing the biggest challenge towards enforcement of the Act, having a robust due diligence process and anti-corruption provisions in contracts with third parties need to be encouraged.

- **75%** Third party intermediaries pose the biggest challenge
- **59%** Have adequate procedures to facilitate a robust due diligence on third parties
- **47%** Have an anti-corruption provision in their contracts with third parties

With companies operating in and/or being listed on foreign stock exchanges, they need to consider the impact of ensuring compliance with all applicable AB&C legislations; and we hope this report would be one step towards facilitating that.

Deepankar Sanwalka
Partner and Head, Risk Consulting
KPMG in India

Rohit Mahajan
Partner and co-Head, KPMG Forensic services
KPMG in India
Bribery and corruption exists in all parts of the world in varying degrees. Seven of the ten executives surveyed in KPMG’s Global Anti-Bribery and Corruption Survey 2011 believe there are places in the world where businesses cannot be done without engaging in bribery and corrupt conduct. Of the remaining executives who do not believe bribery and corruption are endemic in some parts of the world, approximately 28 percent have nevertheless chosen not to do business in a country due to bribery and corruption issues.

“Bribery if left unchecked, destroys the integrity and ethical foundations of all institutions, public and private”
Kenneth Clarke, Lord Chancellor and Secretary of State for Justice

It has created four criminal offenses relating to bribery – bribing another, being bribed, bribing a foreign official, and, for commercial organizations, failing to prevent bribery. The act also marks the first time that bribery will be a corporate crime in the UK. Some of the salient features of the act that make it more stringent compared to other regulations across the globe include:

- Expands to commercial bribery as well as bribery of public officials and prohibits facilitation payments
- Receiver and the payer of the bribe can be prosecuted. It will be illegal to bribe, as well as request or accept a bribe.
- Corporate offence of ‘failing to prevent bribery’. The only defense available to the company is proving that it had taken “adequate measures” to prevent such non compliance.
- Extra-territorial jurisdiction that will permit UK authorities to pursue cases involving British nationals, companies and residents irrespective of the place(s) of offense, and
- Severe penalties including unlimited fines for companies and imprisonment up to 10 years for individuals. In fact, British authorities announced one of the first charges in August 2011 on a clerk in a London court for allegedly offering to influence criminal proceedings in exchange for a bribe. Though, focused on an individual this prosecution indicates government’s willingness to enforce cases under this law and swiftness by which the cases can be finalized.

To guide compliance, the nation’s Ministry of Justice (MOJ) in March 2011 published a guidance clarifying various elements as well as included steps companies could/should take to prevent corruption. UK’s Serious Fraud Office also released its statement on how it interprets the various Bribery Act provisions, adopting which, would demonstrate the company’s proactive efforts in preventing and detecting non compliances under the act.

UK Bribery Act comes into play
Regulators across the globe are attempting to represent ethical and competitive business cultures with newer and stringent anti corruption regulations. The UK Bribery Act which came into effect on 1 July 2011 is one such stringent law that has completely revolutionized British law on bribery.

The 2011 Corruption Perceptions Index shows that public frustration is well founded. No region or country in the world is immune to the damages of public-sector corruption, the vast majority of the 183 countries and territories assessed scores below five on a scale of 0 (highly corrupt) to 10 (very clean).
1. Proportionate procedures
2. Top-level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review
With increased business complexity and globalization, corporates are faced with numerous challenges in entering and operating in newer geographies. These challenges primarily deal with nature of the business culture and practices adopted in such geographies. Many a time, investors and corporate executives across the globe are concerned about business practices, adopting which, may make them non-compliant with certain global laws and not adopting which, may make them less competitive in such geographies.

“Facilitation payments” has been one such topic of much discussion in the recent years. The Act adopts a Zero Tolerance approach and provides no specific defense for facilitation payments. Encouragingly however, 69 percent of the respondents to the survey reflected that business in India can be conducted without facilitation payments (Refer to Fig 1), which is perceived to be a routine business practice in India.

With the recent progress being made in the fight towards bribery and corruption, a desire to enter international markets and attract investment, fear of extra territorial jurisdiction by foreign laws and domestic outrage at blatant corruption; have perhaps facilitated this change and new conviction. However, in our experience we have also noted that at times, these expenses are not recorded on the books and/or corporates are not very open about admitting to such practices.

**Fig 1: Do you believe that business in India can be conducted without facilitation payments?**

- Yes: 69%
- No: 19%
- No comment: 12%

*Source: KPMG in India’s Doing business under the UK Bribery Act survey 2012*
The starting point for a strong AB&C framework is a policy statement that provides guidance to the organization and its stakeholders. In our experience, while organizations are focused on developing a formal/informal guidance to bribery and corruption related matters and how to tackle such issues, areas which have not been clearly defined by the law such as gifts and hospitality, definitely pose a challenge for organizations. While ‘better practices’ for compliance are still evolving and businesses are attempting to adopt such practices, we believe that an organization's view of the adequacy of such policies and procedures are relative.

Reflecting this belief, over 90 percent of the respondents to the survey indicated that their organization has adequate anti-bribery and corruption policies (Refer to Fig 2) however, 28 percent mentioned that their organization does not have a written policy on gifts and hospitality (Refer to Fig 3) which is one of the main factors to form the foundation of a robust AB&C policy. This clearly reflects the ambiguity that organizations have on what constitutes an effective AB&C program. Companies need to move beyond the top layer and scratch further down to reveal the various elements that will lead to a comprehensive and efficient system.

**Fig 2:** Do you believe that your organization has adequate anti-bribery and corruption policies in place?

- **Yes:** 91%
- **Not aware:** 9%

**Source:** KPMG in India’s Doing business under the UK Bribery Act survey 2012

**Fig 3:** Does your organization have a written policy on gifts and corporate hospitality?

- **Yes:** 69%
- **No:** 28%
- **Not aware:** 3%

**Source:** KPMG in India’s Doing business under the UK Bribery Act survey 2012

**Fig 4:** Does your organization have an adequate training mechanism, which includes signed acknowledgements, with reference to UK Bribery Act compliance?

- **Yes:** 53%
- **No:** 35%
- **Not aware of the extent/More can be done:** 6%

**Source:** KPMG in India’s Doing business under the UK Bribery Act survey 2012
The respondents reflected a similar perception when questioned on the aspect of communication and training which is yet another basic element of an AB&C compliance program and is part of the UK MOJ’s guidance on what constitutes “adequate procedures” in relation to the UK Bribery Act 2010. Only 53 percent of the respondents acknowledged (Refer to Fig 4) that they have an adequate training mechanism in place, while over 90 percent believed that their organization has an effective communication mechanism in place expressing Zero Tolerance towards corrupt activities (Refer to Fig 5).

While there seems to be a positive trend towards a greater awareness of the business and legal implications for well developed AB&C compliance programs, many of the compliance programs lack sufficient depth and breadth to effectively mitigate AB&C risks around the world which appears to lead to a false sense of security for senior management as they are under the perception of having ‘adequate procedures’. With the above factors in mind, there is definitely a need to educate and create awareness on what constitutes a robust AB&C compliance program.

**Fig 5**: Do you believe that your organization has an effective communication mechanism in place which expresses zero tolerance towards corrupt activities?

Source: KPMG in India’s Doing business under the UK Bribery Act survey 2012
Dealing with third parties

Risk emanating from relationships with third parties and their conduct can be significant. The Act specifically defines ‘associated’ persons and indicates that a commercial organization is liable under the act if a person ‘associated’ with it, bribes another person, intending to obtain or retain business or a business advantage for the organization. The definition of ‘associated’ person is wide enough to include contractors, business partners, suppliers of services, joint ventures partners, associates and agents.

With the expanse of the law having introduced the definition of “relevant commercial organization” which may be interpreted as covering entities located, organized or conducting “all or part of their business” in the UK as well as Indian companies with operations in the UK, one needs to monitor their own business as well as subsidiaries/third parties that act on their behalf.

Organizations need to realize that the risk of non-compliance can increase when third parties are involved since the organization itself will be held responsible for the ‘act’ of non-compliance conducted by the third party. Businesses are exposed to greater risk due to the limited ability to influence the acts and business practices of their third parties.

Respondents to the survey emulated such a perception with 75 percent of them (Refer to Fig 6) indicating that third parties pose the greatest challenge in the effort towards enforcing the Act.

While due diligence is one of the proactive measures to evaluate whether the third party business practices are in line with relevant regulations (prior to entering into a business relationship), over 40 percent of the respondents (Refer to Fig 7) believed that their organization does not have or they are not sure on the existence and adoption of adequate procedures that facilitate a robust due diligence on third-parties.

Further, considering the challenges in ensuring anti-corruption compliance by third parties, incorporating anti-corruption provisions in the agreement with third parties is one of the bare minimum necessities that should be adopted by companies. Hence, it was disconcerting to note that only 47 percent of the respondents include such a provision in their contracts with third-parties (Refer to Fig 8).

All of the above findings indicate that businesses at large are yet to evolve to comprehensively handle the risk of non-compliance by a third party. It is pertinent to note that adequate due diligence on third parties is one of the key principles of the “adequate procedure” guideline published by the UK Serious Fraud Office (SFO). It is the responsibility of the organization to train their employees but in addition, to educate their third parties as well.

Companies need to realize that it is not only about having a policy in place but the necessity of evangelizing that across the larger organization and environment that they work in.
“The Guidance” issued by the UK Ministry of Justice was a proactive step that was taken to clarify various elements as well as include ‘adequate procedures’ that companies could/should take to prevent and detect non-compliance under the Act. The six broad principles should be kept in mind and need to be given equal consideration while designing their procedures.

While 75 percent of the respondents opined that their organizations have adequate procedures in place to monitor the compliance of AB&C procedures (Refer to Fig 9), about 53 percent of the respondents felt that their organization does not conduct or were not sure if their organization conducts a risk assessment with reference to the exposure of bribery and corruption (Refer to Fig 10).

Risk assessments are a crucial part of a rigorous AB&C compliance program. When done well, they provide management with timely, in-depth, specific and actionable information regarding the level of AB&C compliance risk across the organization. This information, in turn, allows management to design and tailor its AB&C program in alignment with the entity’s risk management strategies. It is thus a matter of concern when such a high percentage of respondents indicate that they either do not conduct a risk assessment or are not aware.

Fig 9: Does your organization have adequate procedures to monitor the compliance of anti-bribery and corruption procedures?

![Fig 9](image_url)

Source: KPMG in India’s Doing business under the UK Bribery Act survey 2012

Fig 10: Has your organization conducted a risk assessment with respect to the exposure of bribery and corruption?

![Fig 10](image_url)

Source: KPMG in India’s Doing business under the UK Bribery Act survey 2012
Further, while much guidance has been issued by a variety of governmental as well as non-governmental organizations regarding compliance programs, when having questioned organizations on the level of importance of the six broad principles, majority of our respondents stated top level commitment and communication to be the two most important areas out of the six (Refer to Fig 11).

Tone at the top not just refers to the commitment of the organization’s management to compliance, but also extends to the commitment of the board members. With corporate values and codes of conduct featuring high on the agenda - managing the risk of bribery and corruption thus needs to take center stage in corporate boardrooms. Reflecting such a perspective, 75 percent of the respondents mentioned that the level of involvement of their board towards UKBA compliance is high (Refer to Fig 12).

It is pertinent to note that as per Section 14 of the UK Bribery Act, a director/senior management can be held liable for violations if an offence under the Act is committed with the ‘consent or connivance’ of a director/senior officer who (the director/senior officer) has close connection to UK. Under the law, close connection to UK includes any British Citizen and anyone who is ‘ordinarily resident’ in UK. Though the law has not defined the act of consent or connivance, we believe that ignorance, inadequate oversight on compliance by board members may possibly make them individually liable for non compliance under the Act. With the rise in individual prosecutions under global anti-corruption regulations, it is important for directors to evaluate the level of compliance. Considering the lack of adequate clarity in the evolving regulation, 44 percent of the respondents felt that their company’s directors are either not concerned or not aware of the possible personal implications with regard to the violation of the UK Bribery Act.

While it is a positive sign that the senior management is more involved in addressing the risks associated with anti-bribery and corruption; ‘the guidance’ lays stress on all six factors and not just on a few. With the findings stated in all of the sections above, it is quite clear that other areas are significantly lacking and the bar needs to be raised.
Conclusion
Responding to the challenges

In our joint report with the British Business Group, launched in 2011, which addressed the Challenges faced by British business in India, the respondents unanimously agreed that eradicating corruption was an important area and that they would ensure compliance of the Act. To this extent most of the companies have appointed legal advisors in the UK and have already included the necessary components and processes in their risk and compliance structures. In a lot of cases senior management teams have begun travelling to India to stress the importance of this Act to Indian employees. Many companies have also adopted a Zero Tolerance attitude to corruption where business deals are not considered if there is any aspect of bribery or corruption involved.

Measures also included not allowing cash transactions of more than a nominal sum, which automatically mandates transactions being on record thereby discouraging the payment of bribes. However, a number of participants did view serious difficulties in complying with the Act, particularly, in terms of the need to be aware of not just what their company was doing but to also be responsible for the actions of its employees and business associates.

Organizations need to adopt an integrated and holistic process that encourages stringent compliance and enforcement so as to be able to fight the risks posed by bribery and corruption. The approach could thus broadly cover the following:

- Having written AB&C policies and procedures (including distribution of the same to agents, distributors, vendors, brokers, joint venture partners, and or suppliers) in place
- Drawing up a comprehensive code of conduct across all group companies, which is continually monitored and revised that communicates the organization’s Zero Tolerance towards corruption
- Committee responsible for overseeing compliance with AB&C regulations with a full-time dedicated AB&C compliance officer
- A comprehensive and periodic risk assessment mechanism alongside a concurrent monitoring mechanism (and internal audit protocols), including third party audits with specific reference to corruption related risks
- A structured whistle blowing mechanism (i.e. compliance or ombudsman hotline) to report potential bribery/ corruption issues
- Regular communication and training programs (extending the participation beyond only employees etc. to include third party representatives)
- Exercise the “right to audit clauses” in third party contracts
- Periodic compliance certifications from agents, distributors, vendors, brokers, joint venture partners, or suppliers.
Acknowledgement

We would like to sincerely thank all the participants who provided us with their time and responses for the survey. This document would not have been possible without their invaluable contribution.
The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. The views and opinions expressed herein as a part of the Survey are those of the survey respondents and do not necessarily represent the views and opinions of KPMG in India.

© 2012 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved. The KPMG name, logo and “cutting through complexity” are registered trademarks or trademarks of KPMG International.