

Principles for an Anti-Corruption Programme under the UK Bribery Act 2010 in the Energy & Extractives Sector

2nd Edition

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Section 7 of the UK Bribery Act 2010 (the Act) creates an offence applicable to relevant commercial organisations¹ if a person associated with that organisation bribes another person intending to obtain or retain business for the organisation, or to obtain an advantage in the conduct of business for the organisation. The only statutory defence available to an organisation charged with this offence is if it is able to show that it had in place “adequate procedures” designed to prevent persons associated with the organisation from undertaking such conduct.

This offence is widely drawn, as an associated person is any person who performs services for or on behalf of the organisation. The capacity in which the services are performed does not matter, and an associated person may include an employee, agent, subsidiary or even in some circumstances a joint venture or supplier². Determination of whether a party is an associated person under the Act will be by reference to all relevant circumstances.

The principles set out in this document are intended to provide assistance to organisations operating in the energy and extractives industries on key areas to consider as they seek to prevent bribery in their organisations, either directly, or indirectly through an associated person.

The principles are not intended to be prescriptive or all-encompassing. Each organisation will need to tailor its policies and procedures to its own circumstances, including in particular the risk profile of its business activities.

The key principles are based on those that contributors to this document employ in their own businesses and may be used as a reference to assist organisations to develop or enhance their own procedures, based upon the risk profile of their business activities. Departure from the key principles in this document will not itself give rise to a presumption that an organisation does not have adequate procedures.

These principles should be read in conjunction with the guidance issued by the Secretary of State for Justice³ (“MOJ Guidance”) and the Joint Prosecution Guidance⁴. The principles in this document have been given the same headings as the principles used in the MOJ Guidance. However, this document addresses the principles in a different order to aid a discussion of the inter-relationship between the principles.

¹As defined in section 7(5) of the Act. References in this document to an “organisation” or “organisations” are to “relevant commercial organisations” as defined in the Act.

²If and to the extent that the joint venture or supplier performs services for or on behalf of the organisation. See definition of “associated persons” in section 8 of the Act.

³The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (see: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>).

⁴Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (see: <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>).

To the extent that these principles are being applied internationally, organisations may wish to take into account requirements under other international and local anti-corruption laws.

In this second edition, the principles have been reviewed and updated to include additional guidance on issues such as joint ventures and post-acquisition due diligence. The group is also pleased to welcome Eni UK Limited, Genel Energy plc and Total SA as additional contributors since the publication of the first edition.

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The contributors would like to thank the Institute of Business Ethics for its assistance in the development of these principles.

1. Risk assessment

Key principles

- Risk assessments should be conducted periodically and also in response to specific issues.
- Once corruption risks have been identified, they should be managed appropriately.
- Business units should be responsible for the active management of their corruption risks.

A thorough assessment should be carried out periodically of the corruption risks that an organisation faces. Risk assessments may also need to be carried out in response to specific events and are likely therefore to be evolving.

Organisations should consider how best to carry out risk assessments. For example, it may be appropriate for business units to analyse the types and level of risk faced by their activities in order to encourage ownership of that risk within the business unit. The assessment could be facilitated by one or more of the compliance, risk, legal or audit functions.

As the types and levels of risk are assessed, the organisation's anti-corruption policies and procedures should be reviewed to decide whether they need to be revised in order to mitigate corruption risks further (see paragraphs 4 and 6 below). Organisations should actively manage risks and not simply identify what they are.

2. Top level commitment

Key principles

- Top level management should demonstrate and communicate a clear commitment to ethical business conduct, including a commitment to combat all forms of corruption.
- Organisations should prohibit all bribery.
- Organisations should prohibit facilitation payments.
- Top level management should ensure that anti-corruption policies and procedures are implemented across the whole of an organisation's operations and functions.
- Corruption risk should be raised at meetings of top level management.

Top level management should demonstrate a clear commitment to ethical business conduct. Organisations will need to determine how best to demonstrate a clear commitment both internally and externally. Adopting anti-corruption policies and procedures will help to achieve this. These policies and procedures should unequivocally prohibit the making or receiving of corrupt payments and prohibit facilitation payments⁵.

Policies and procedures should apply across all business units and functions of an organisation, however disparate an organisation's activities may be. These policies and procedures need to be revisited in light of risk assessments and should evolve in accordance with the needs of, and risks encountered by, the relevant business unit or function.

Responsibility for maintaining high standards of ethical business conduct should be both personal and collective. The board (as appropriate) and senior management should understand and demonstrate an ongoing appreciation of the corruption risks that the organisation faces. Corruption risk should therefore be a topic that is raised at meetings of top level management.

The board is responsible for setting anti-corruption policies, tasking management to design, operate and monitor anti-corruption policies and procedures, and keeping these policies and procedures under regular review (see paragraph 6 on Monitoring and Review below for further comment on this issue). Management's role is to implement the board's policies and to maintain anti-corruption procedures.

It should be made clear that all staff are responsible for complying with the organisation's policies and procedures in the day-to-day conduct of business and that disciplinary action will be taken in the event that the organisation becomes aware of corrupt activity by staff.

⁵ Policies should not require staff to take or refrain from taking any action that would endanger their health or safety.

Senior management should demonstrate leadership on the issue of anti-corruption compliance in an organisation's approach to any associated persons. For example, organisations which have representatives on the boards of any joint ventures should consider raising anti-corruption compliance at board meetings of that entity on a periodic basis.

3. Due diligence

Key principles

- Organisations should have due diligence procedures for associated persons, which are conducted applying a risk-based approach.

Due diligence should be conducted on proposed associated persons using a risk-based approach. The location of the associated person's business, the nature of the business and any other indicators which signify a higher risk will be relevant. The level of due diligence will depend upon the level of perceived risk created by the relationship with the associated person. For example, in lower risk scenarios, organisations may decide that there is no need to conduct any due diligence. By contrast, in higher risk relationships there is likely to be a need to carry out enhanced and tailored due diligence covering issues such as the associated person's ownership structure, the associated person's own anti-corruption procedures, the reputation of the associated person and whether there are any reports of past breaches of anti-corruption legislation by the associated person.

In light of the due diligence carried out, organisations should consider whether it is appropriate to go forward with the relationship, or whether further due diligence is required before a decision is taken.

Due diligence may reveal that an associated person has a past record of non-compliance with anti-corruption legislation. This does not mean that an organisation should not enter into or continue a business relationship with the associated person, but it will often be appropriate to enter into a dialogue with the associated person to establish what steps it has taken to improve its own compliance procedures and to identify what further actions may be required in order to mitigate corruption risk in the circumstances.

In some circumstances, organisations may be contractually obliged to make legitimate and proportionate payments to foreign public officials or persons connected with them (for example, by way of director's fees and reasonable expenses, rent on property, or training obligations under a production sharing agreement with a national oil/ gas/ mineral company). In such circumstances, due diligence should be carried out prior to the contractual obligation being agreed, to ensure that appropriate value is being paid.

4. Proportionate procedures

4.1 Overview

Key principles

- Anti-corruption policies and procedures should be tailored to reflect the level of assessed risk.

Policies and procedures should reflect the level of assessed risk. There may not be a need to apply the same procedures across the whole of the organisation's business activities.

In the section below, this document addresses principles that organisations should consider in relation to: gifts, hospitality and promotional expenditure; foreign public officials; sponsorship, donations and government relations; associated persons; and acquisitions.

4.2 Gifts, hospitality and promotional expenditure

Key principles

- Reasonable, proportionate and bona fide hospitality or promotional expenditure is an established and important part of business.
- Organisations should have a policy on the receipt and provision of gifts and hospitality, together with supporting procedures and a process to review compliance with such procedures.

It is customary for organisations to provide incidental gifts and hospitality to customers and other third parties during the course of doing business. The MOJ Guidance on adequate procedures recognises that “bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business”⁶. Gifts and hospitality should, however, not be given in order to induce a person or organisation to act improperly. It is therefore important to establish a policy on the circumstances in which it is acceptable to provide or receive gifts or hospitality.

⁶ See paragraph 26 of the MOJ Guidance (<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>) and also page 10 of the Joint Prosecution Guidance (<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>).

Any gifts or hospitality should be reasonable, proportionate and transparent. Organisations should consider setting limits on an individual and aggregate basis on what gifts and hospitality staff can self-approve and an upper limit above which approval by someone more senior will be required. Approval amounts may vary depending on the jurisdiction in which the gift or hospitality is to be given.

Organisations should put in place a process to review compliance with its gifts and hospitality procedures. One such review option is a gifts and hospitality register to record gifts and hospitality above specified levels in each country in which the organisation carries on business. This will help organisations to monitor the aggregate spend on individuals and on individual organisations, and also the frequency of such expenditure.

4.3 Foreign public officials

Key principles

- Transparent, proportionate, reasonable and bona fide promotional expenditure involving public officials will usually be acceptable.
- Consider appropriate safeguards to ensure expenditure is carefully managed and accurately reported

Organisations should ensure that any gifts and hospitality to foreign public officials are reasonable, proportionate and bona fide.

Organisations will regularly spend money on promoting their business. Reasonable, proportionate and bona fide expenditure, such as travel expenses and accommodation incurred by a business on behalf of a foreign public official, will usually be acceptable. In many such cases, the advantage provided will be an advantage to the foreign government concerned rather than to the official, since the trip will assist in developing the foreign government's knowledge about the product or project in question⁷. For example, organisations may pay for a foreign public official to visit a company's facilities or a similar project site. In such circumstances, it might be proper for the organisation to pay for the public official's reasonable travel expenses and accommodation, as well as other proportionate subsistence costs.

Organisations should put safeguards in place to ensure that any expenditure is reasonable and proportionate and made for bona fide purposes. For example, a process could be implemented whereby staff must explain the circumstances surrounding the expenditure and give legitimate reasons why certain expenditure is needed before any payment is approved by the designated person(s). Organisations should periodically review and monitor the operation of any such safeguards or processes.

⁷ See paragraph 27 of the MOJ Guidance (<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>).

4.4 Sponsorship, donations and government relations (including lobbying)

Key principles

- Develop a policy on the provision of sponsorship and donations.
- Incorporate appropriate terms in agreements.
- Conduct risk-based due diligence.
- Consider enhanced procedures for donations to political parties.

Organisations should put in place clear policies on sponsorship and donations. While it will be common for organisations to provide sponsorship and donations or to make community-related payments, they should not be made for corrupt purposes. Organisations should encourage transparency of such payments and put in place appropriate processes, including clear criteria for giving sponsorship and donations.

It will be important, on a risk-based approach, to conduct due diligence on proposed sponsorships and donations so that organisations are satisfied that monies will be used for the purposes indicated.

Governments may dictate how donations are to be made and how monies will be spent. It may, however, be helpful to enter into an agreement with the recipient of the payment which sets out how the funds will be spent and includes appropriate anti-corruption wording. Organisations should, where the risk justifies such an approach, seek a right to audit recipients' books, records and processes and/or a right to obtain information, in order to verify that any donations have not been used for corrupt purposes.

Where organisations permit donations to political parties they should consider whether enhanced processes are required for such donations in order to avoid any risk of improper influence.

4.5 Associated persons

Key principles

- Organisations should have risk-based due diligence procedures for associated persons.
- Specific anti-corruption provisions should be included in organisations' contracts with associated persons.
- Associated persons should, applying a risk-based approach, be encouraged to adopt standards that are no less rigorous than those applicable to the principal organisation.

The Act defines “associated person” to mean any person performing services for or on behalf of a commercial organisation⁸. Determination of whether a party is an associated person under the Act will be by reference to all the relevant circumstances and may include an organisation’s staff, agents, contractors, subsidiaries, or even in some circumstances joint ventures or suppliers, to the extent that they are performing services for or on behalf of the organisation.

Organisations should consider the following issues with a view to managing the corruption risk that can be presented by associated persons:

(a) Due diligence

Organisations should have in place risk-based due diligence procedures which apply to associated persons (see paragraph 3 for more details).

(b) Joint ventures

Organisations will often enter into joint ventures⁹ and will have varying levels of control over those entities or arrangements. An organisation should exercise whatever influence it has to encourage the adoption of adequate anti-corruption policies and procedures within the entity or arrangement.

To the extent that an organisation has sufficient control over a joint venture to do so, it should exercise that control by putting adequate anti-corruption policies and procedures in place within the entity that are consistent with the principles set out in this document.

In the case of joint ventures where the organisation does not control the entity concerned, influencing may include but is not limited to:

- asking relevant questions about anti-corruption controls at operating committee meetings, shareholders' and/or board meetings;

⁸ Section 8.

⁹ Whether jointly operated or not. As the MOJ Guidance acknowledges (paragraph 40), these arrangements may come in many forms, but are referred to collectively as “joint ventures” throughout these Principles.

- using shareholder or contractual rights, including audit rights; or
- using board representation to raise the matter at board meetings.

If there is continued resistance to the implementation of appropriate anti-corruption standards, this resistance should where appropriate be escalated to the organisation's top level management to address as appropriate.

Organisations that have the right to appoint directors of a separate entity (for example, a joint venture) should be mindful of the individual duties of these directors and support them with training and guidance on anti-corruption risks, either from the organisation itself or the entity in question.

(c) High risk agents, consultants and intermediaries

Organisations should consider whether their existing systems and controls are adequate to deal with the risks posed by higher risk agents, consultants and intermediaries.

(d) Terms

If an organisation decides to enter into a contract with an associated person, it should (applying a risk-based approach) decide whether to include additional anti-corruption provisions in the written contract over and above any standard clause which requires compliance with written laws. Organisations should consider implementing processes designed to ensure that such provisions are incorporated in a standard form across the organisation. Anti-corruption provisions may include one or more of the following terms:

- (1) confirmation that no bribes have been or will be made in contravention of any relevant anti-corruption legislation to obtain or perform the contract
- (2) confirmation that the principles set out in the organisation's¹⁰ anti-corruption policy will not be violated
- (3) rights to obtain information which the organisation reasonably requires for the purposes of its own anti-corruption policies and procedures
- (4) right to suspend payments or terminate the contract if the anti-corruption provisions are breached
- (5) requirement to keep accurate books, accounts and records
- (6) right to audit books, accounts and records
- (7) certification of compliance by the associated person
- (8) requirement that contractors incorporate similar terms in contracts with sub-contractors and certify that they have done so

in each case, according to the importance, risk and circumstances of the relevant contract.

¹⁰ i.e. as opposed to the associated person's policy.

Organisations should consider conducting a risk-based review of existing relationships to ensure that anti-corruption wording is, where possible, included in relevant contracts. The review of existing contracts will be particularly important for higher risk relationships.

(e) Training

Consideration should be given to training for associated persons on their responsibilities under relevant anti-corruption legislation and on the organisation's policies. The need for training should be assessed on a risk-based approach and the degree and method of any training should then be determined by reference to the risks assessed. Conducting appropriate due diligence on associated persons should help organisations to determine whether further training is needed. Consideration should also be given to whether contractors should impose any training requirements on their sub-contractors.

(f) Monitoring

Relationships with associated persons should be monitored appropriately (see paragraph 6 on Monitoring and Review). Organisations should make appropriate use of their contractual rights, in particular any right to audit. If potential breaches are identified, this should be escalated within the organisation and a detailed review of the relationship with the associated person may need to be conducted.

4.6 Acquisitions

Key principles

- Pre-acquisition due diligence should include due diligence on corruption risks.
- Include anti-corruption protections in acquisition documents.
- Apply anti-corruption policies and procedures to acquired entity.

The process of acquiring third party entities (or an interest in them) can leave organisations exposed to the risk that the newly-acquired entity has made, and in some cases may continue to make, corrupt payments¹¹. Pre-acquisition due diligence should therefore include due diligence in relation to the target entity's corruption risk and should also take into account the relevant country risk. This due diligence should, where possible, include a review of the target entity's anti-corruption policies and procedures to identify areas that will need to be revised. It may be appropriate to seek to review the target entity's existing key contracts with associated persons to determine whether they include appropriate anti-corruption protections.

If concerns are raised during the due diligence process, the organisation should consider whether the acquisition is a transaction with which it is prepared to proceed.

¹¹ Note the reference to the corruption risks inherent in M&A deals at page 27, paragraph 4.4 of the MOJ Guidance.

It is important to ensure that the acquisition agreement provides appropriate anti-corruption compliance representations and warranties.

Organisations should also bear in mind the potential money laundering/proceeds of crime implications under relevant anti-money laundering legislation and related regulatory requirements of acquiring an entity which is suspected of having been involved in corruption.

Once the transaction has completed, the organisation's anti-corruption policies and procedures should be implemented within a target entity as soon as reasonably possible. In addition, consideration should be given to conducting post-acquisition due diligence using a risk-based approach, in particular where pre-acquisition due diligence has been constrained.

5. Communication (including training)

5.1 Communication

Key principles

- Organisations should develop an effective anti-corruption communication strategy.
- Anti-corruption policies and procedures should be readily understandable and accessible by all staff.
- Policies and procedures should be communicated on an on-going basis.

Policies and procedures should be effectively communicated (led by top level management), in readily accessible language, so that they are easy to understand in the context of the relevant business unit. In communicating the policies and procedures internally, organisations should explain in a clear and understandable way what they are, how they are intended to operate and that responsibility for adherence to policies and procedures is shared between the organisation's staff. Using practical and business-relevant scenarios and examples will help to achieve this.

Organisations should develop an appropriate communication strategy on this issue. Procedures should be communicated to staff in an appropriate way (either electronically or in hard copy) and should be translated into local languages where necessary or desirable. Staff will need to be aware of the policies and procedures and know where to locate them, for example, by making them available on the organisation's intranet (see also the section on training in paragraph 5.2).

The communication strategy should be ongoing in order to ensure that staff are reminded of the content of updated policies and procedures and their obligations, and that new staff are made aware of their obligations.

5.2 Training

Key principles

- Staff should be trained according to a risk-based approach.
- Refresher training should be provided at intervals dependent upon the assessed risks.
- Appropriate methods of training should be implemented.

Organisations should train their staff (according to a risk-based approach) and the degree and method of any delivery of training should then be considered according to the risks assessed. Low risk staff will need to be aware of the anti-corruption policies and procedures and where to locate them, for example, by making them available on an organisation's intranet. Higher risk staff should receive specific training on policies and procedures.

Organisations should develop and execute an anti-corruption training strategy setting down matters such as:

- Who is functionally responsible for designing the training materials
- The training needed
- The target audience
- The translation requirements
- The period after which the training materials will be refreshed
- The period after which training needs to be re-delivered
- The chosen methods of training delivery
- The creation of attendance logs of individuals trained.

Training should not be seen as a one-off event and will need to be refreshed. The nature and frequency will depend on the risks assessed. Staff working in high risk jurisdictions will need to receive more regular refresher training. The procedures should also address the need for anti-corruption training of new staff.

Training does not need to be simply instructor-led. Updates to processes could be provided by email or memorandum, or could be posted by an organisation on its intranet. A combination of different training methods will encourage staff to absorb the information.

5.3 Staff issues

- Recruitment processes – consider screening of potential staff.
- Put in place appropriate disciplinary procedures, which are effectively communicated to staff and are applied consistently.

(A) Recruitment

It is important that organisations have staff who share the organisation's values and act in an ethical way. Where it is possible, and on a risk-based approach, organisations may consider it appropriate to screen potential staff to determine whether they have any links to public officials¹².

Many organisations require compliance with their code of ethics to form part of their employees' terms and conditions of employment.

(B) Disciplinary procedures

Organisations should put in place appropriate procedures to deal with breaches of their code of ethics or anti-corruption policies and procedures. Senior management should be committed to compliance by staff with an organisation's anti-corruption policies and procedures. Any alleged breaches by staff should be appropriately investigated. Senior management should be consistent in enforcing an organisation's policies and procedures and in applying disciplinary procedures at whatever level the breach has occurred.

5.4 Reporting facilities

Key principles

- Provide a reporting facility for staff on ethical issues and raise awareness of its availability.
- Consider publicising reporting facility details to associated persons.
- Publish and actively communicate a non-retaliation policy.

It is common to provide a reporting facility to staff. Organisations may wish to allow reporting on an anonymous basis¹³ and, if businesses are international, will want to ensure that the reporting facility is available to staff in those locations when local offices are open. Organisations should provide appropriate translation services within the reporting facility.

¹² See also page 28, paragraph 4.6 of the MOJ Guidance.

¹³ If permitted by local law.

Organisations should publish and communicate a non-retaliation policy. They should actively seek to ensure that staff are not retaliated against if they report alleged unethical activities carried out by other staff or associated persons. Persons making such reports should be informed that they will not be penalised for “speaking up” in good faith.

Organisations should consider whether to make reporting facilities available to associated persons. In any event, reporting facility details should be widely publicised internally on, for example, an organisation’s intranet.

6. Monitoring and review

Key principles

- Monitor relationships with associated persons and update due diligence.
- Monitor staff compliance with policies and procedures.
- Periodically review policies and procedures, applying a risk-based approach.

The way in which staff adhere to policies should be monitored regularly. Relationships with associated persons should be monitored but this will depend on the type, length and risk of the relationship. Due diligence information may also need to be updated.

It will be important periodically to monitor anti-corruption policies and procedures. The levels of risk imposed by particular parts of an organisation's business will determine whether an assessment should be carried out, how often the assessment should take place and what should be assessed. Reviews of company policies and procedures will not just be aimed at anti-corruption matters, and a review of anti-corruption procedures can be included in a review of other policies and procedures. Procedures may need to be adapted in light of lessons learned.

14 February 2014 (2nd Edition)

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