

Responding to the UK Bribery Act 2010

*Informing UK commercial
organisations operating in
emerging markets, specifically
in BRIC countries.*

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RUSSO-BRITISH
CHAMBER OF COMMERCE



UK INDIA
BUSINESS COUNCIL



China-Britain
Business Council
英中贸易协会

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Welcome

Ian Powell

Chairman and Senior
Partner PwC UK



The Bribery Act 2010 (the ‘Act’) came into force on 1 July 2011. This far-reaching legislation has potentially significant ramifications for UK businesses that operate in overseas markets, as well as foreign commercial organisations that operate in the UK.

The global reach of this legislation means that UK organisations operating in foreign markets could be liable for prosecution in the UK if they are accused of engaging in corrupt practices, as defined by the Act.

With this in mind, the UK-India Business Council, the China-Britain Business Council, the Brazilian Chamber of Commerce for Great Britain, and the Russo-British Chamber of Commerce, together with PwC¹, are working to inform UK commercial organisations operating in

emerging markets about how best to prepare. The purpose of this report is to raise awareness of bribery risks, as well as suggesting how commercial organisations can mitigate those risks and protect themselves from the potentially damaging consequences of infringement – not least in reputational terms.

While the focus of this report is on UK organisations going overseas, we would also encourage foreign commercial organisations with interests in the UK to seek appropriate professional advice regarding their potential exposure.

I hope you will find this guide useful. Please contact us if you would like more details about the Bribery Act 2010 or advice on any wider corporate governance, risk or compliance issues.

Jaime Gornsztejn

Chairman
Brazilian Chamber of
Commerce in Great Britain



The Brazilian Chamber of Commerce welcomes this initiative on behalf of its members. The Act has far-reaching implications for their businesses and this report provides a helpful guide to explain its potential impact.

The internationalisation of its domestic commercial organisations, growing diversified economy, and burgeoning foreign direct investment into the country have already seen Brazil make significant progress in the implementation of corporate governance best practices. Brazilian business is facing a transformational period with the introduction of better corporate governance and accounting procedures followed by the convergence of local accounting and auditing standards with International Financial Reporting Standards (IFRS).

The Brazilian Chamber is committed to sharing these achievements by monitoring the effects of the Act on its members, as well as educating the public, both in the UK and Brazil, of the Act’s impact on various business sectors.

The Chamber is actively engaged with several seminars and programmes aimed at addressing the concerns and views of members and non-members. Doing business with Brazil can be an engaging and profitable experience, but as with all businesses in new markets, your organisation needs to be aware of the legal requirements and compliance issues that can arise.

By visiting the Brazilian Chamber’s website – <http://brazilianchamber.org.uk> – you can find information on trade and business between Brazil and the UK.

¹ ‘PwC’ refers to PricewaterhouseCoopers LLP (a limited partnership in the United Kingdom), which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity.

Stephen Dalziel

Executive Director
Russo-British Chamber
of Commerce



Russia perhaps has a perceived reputation – within and outside the country – as a place where bribes are necessary to get things done. This unfortunate image is largely a result of the gangster capitalism of the 1990's. Following the Soviet Union's collapse at the end of 1991, and the introduction of a free market economy, criminal activity, corrupt officials and rampant inflation beset the country. It seemed that the only way to do any business was with threats or bribes. Many foreign organisations that moved into Russia at that time did nothing to deter the locals from these practices and Russia rightly earned the nickname, 'the Wild East'.

Fast forward 20 years and Russia is a very different country. Bright and enterprising entrepreneurs have learnt how to conduct business ethically. The generation that has grown to maturity in the past two decades has learnt that profits flow from the application of ethical standards.

The Russo-British Chamber of Commerce (RBCC) always stresses to its members, and

any other UK commercial organisations considering doing business in Russia, that there is absolutely no need to give bribes or indulge in other corrupt practices in Russia. A foreign commercial organisation has only to do this once – for example, by passing money in a brown envelope – and they are indelibly marked. Such reputations are then almost impossible to lose.

It may take a little longer to achieve your business aims by taking the ethical route, but we always urge commercial organisations to adopt a long-term approach to doing business in Russia. If you are going in with the intention of being in the market for ten years or more (a sensible timeline for the Russian market), what difference does it make if you need to spend six months finalising the first deal ethically – rather than rushing it through in two? And at the end of that time, you'll have a clean reputation, instead of being tainted by allegations of bribery (whether as recipient or donor)?

The common-sense approach to doing business in Russia should be to keep it clean, honest and transparent. The profits will speak for themselves.

Stephen Phillips

Chief Executive
China-Britain
Business Council



Opportunities for British business in China are vast, varied and growing, and the importance of the market is increasingly recognised. However, many UK commercial organisations lack the understanding needed to unlock this potential.

The business environment in China has changed dramatically over the last 30 years. Markets have opened up and Chinese commercial organisations and officials have become increasingly aware of international business practices. But the approach to business often differs from accepted practice in the UK.

In addition, business practices vary across the different regions of China. And as UK commercial organisations increasingly access opportunities in fast-developing and emerging parts of the country, they should expect to encounter business partners and other counterparts with limited exposure to foreign organisations.

These differences require a degree of understanding and adaptability from organisations that wish to achieve success. However, they do not obviate good business practice and should certainly not give rise to activities that would not be tolerated at home. Good business practice demands that commercial organisations always have effective oversight of their staff, and of third-parties acting on their behalf. The Act has brought this need into even sharper focus for UK commercial organisations of all sizes.

This report has been produced to clarify this new law and help UK commercial organisations understand what they need to do to ensure compliance. At the China-Britain Business Council we are committed to providing UK commercial organisations with up-to-date advice on the impact of the Act in China, as well as the full range of business issues that can arise there.

Richard Heald

Chief Executive
UK India Business Council



In a country as diverse as India, enjoying predominantly domestically-driven economic growth, the opportunities for UK companies are multiple. Recent years have seen a rapid increase in the level of trade engagement with India by UK companies, either through the setting up of new ventures, expansion of existing businesses, new export contracts and inbound investment from India.

As in many rapidly developing economies, the opportunities from great wealth creation bring accompanying dangers in tow. Corruption is an issue in India. But the momentum is turning against such practices. There has been civil unrest in India recently in protest at some of the more flagrant examples. Politicians and bureaucrats are increasingly being held to account for their actions and there is a palpable sense that if India is to capture its rightful place at the top table of economic powers it must be seen to be enforcing best practice in global governance.

For UK commercial organisations, the obvious mantra is to avoid situations where one might be compromised. This is not always easy. Infrastructure – particularly where public procurement and the requirement to obtain licenses is necessary – remains a specific area of concern. But much trade activity, even in the area of infrastructure, can be done in association with the private sector where standards are good and improving, where there is more transparent intelligence on counterparties and where there is a requirement to

conform to the KYC regulations of dynamic capital and financial markets. The standards of the Indian private sector, UK PLC and the requirements of the Act are very much aligned.

This does not mitigate the need for due diligence for aspiring and existing participants in bilateral trade with India. The Act promotes greater transparency and accountability in business. As such it should not have the effect of discouraging UK businesses from exploring a complex and high-growth economy such as India's.

Of course, UK businesses of all sizes need to find ways to venture into just such markets. It can seem daunting, but many UK businesses are already operating successfully in India through a multiplicity of entry strategies and have been generating profits from such activities.

This brochure seeks to demonstrate the UK India Business Council's commitment to helping UK businesses succeed in India. Moreover, our collaborative approach with trade bodies from other emerging markets seeks to respond to the interests of the business community and our common goal of promoting UK interests worldwide, while supporting greater competitiveness and business integrity.

We hope you will find this brochure informative, and that it will catalyse your market entry efforts. Please do get in touch with us to learn more about entry strategies and the work that we do to make the most of the India opportunity for UK PLC.

It is absolutely essential not to lose ground to your competitors by avoiding emerging territories – but in order to survive in the long term, a clean reputation is essential.

Overview



The UK Bribery Act is in many ways more onerous than the US Foreign Corrupt Practices Act.

Background

Business integrity is fundamental to the success of any commercial organisation. Around the world, businesses are increasingly being held to account not only for what they achieve, both technically and financially, but also for how they achieve it. Bribery, wherever it occurs, can fatally undermine that achievement, creating huge financial and regulatory risk for the organisations involved.

Bribery can also perpetuate corruption, underdevelopment and poverty in those countries where bribes are paid. This issue is driving the international move towards greater anti-bribery enforcement.

The UK Bribery Act 2010 ('the Act') was passed into law on 8 April 2010 and came into effect on 1 July 2011. While bribery has been illegal for a long time in the UK, the Act represents a significant change to UK law in the area of business and commerce. It was introduced partly in response to pressure from the Organisation for Economic Cooperation and Development (the OECD), as well as increasing international criticism of the UK's perceived deficiency in enforcing existing anti-bribery laws. The Act is now widely seen as one of the toughest anti-bribery laws in the developed world.

The overarching precept of the Act is that a commercial organisation must understand and document the risks it faces and take appropriate steps to address them. Any bribery prevention procedures should be proportionate to those risks.

Key offences and penalties

The Act sets out four key offences, which are outlined below.

- Active bribery – offering, promising or giving a bribe.
- Passive bribery – requesting, agreeing to receive or accepting a bribe.
- Bribery of a foreign public official.
- Corporate offence of failure to prevent bribery – liability is triggered by a person acting for, or on behalf of, the organisation paying the bribe. The defence is that the commercial organisation had ‘adequate procedures’ in place to prevent such conduct.

Where a commercial organisation commits any of the first three offences, senior officers may also be liable if they ‘consent or connive’.

The UK government is under considerable pressure to enforce the new legislation. Transparency International’s 2010 Corruption Perceptions Index² showed that the UK’s score had dropped from 7.7 in 2009 to 7.6 in 2010, falling three places in the international ranking from 17 to 20. This has further fuelled concerns over the UK’s international reputation.

Under the Act, not only is bribery an offence, but so is failing to prevent it.

Regulators are also demonstrating their intent, through words and actions, to take a tougher stance against bribery and corruption. This entails increasingly close collaboration and cooperation between the various agencies involved. If and when bribery is identified, there are penalties for both the commercial organisation and the individual(s) responsible.

What are the penalties?

Commercial organisations – an unlimited fine (set at the court’s discretion).

Individuals – up to 10 years’ imprisonment, an unlimited fine (set at the court’s discretion), or both.

Directors – may be subject to disqualification proceedings, potentially leading to disqualification from acting as a director for up to 15 years.

Public contractors – possible debarment from public contracts.

While not stipulated in the Act, collateral consequences for a commercial organisation could involve severe reputational damage through negative press coverage, as well as disruption of business. Conviction can lead to organisations being placed on blacklists and restricting their abilities to tender for certain types of project. In the case of individuals, consequences could involve disciplinary actions and/or termination of employment.

The Serious Fraud Office (SFO)³ has also sent out strong messages about a new approach to the investigation and prosecution of bribery allegations. This involves more emphasis on self-reporting and cooperation in investigations by commercial organisations, with the threat that failure to self-report or to cooperate adequately will lead to heavier sanctions.

² This measures the perceived levels of public sector corruption in 178 countries around the world, on a scale of 0 (highly corrupt) to 10 (highly clean).

³ The Serious Fraud Office, an independent Government department that investigates and prosecutes serious or complex fraud and corruption. This forms part of the UK criminal justice system with jurisdiction in England, Wales and Northern Ireland; however, it excludes Scotland, Isle of Man and the Channel Islands.

Why is it important to respond to the UK Bribery Act?

International enforcement agencies such as the SFO in the UK, the Department of Justice in the US, as well as other bodies around the world, are increasingly collaborating on cross-border cases. This increases the likelihood of detection of bribery and successful prosecution. With the introduction of the Act, UK commercial organisations and others that do business in the UK have no choice but to deal with a new and more threatening anti-bribery regime, including the introduction of a new corporate offence of 'failure to prevent' bribery.

This means that commercial organisations must be able to demonstrate that they have 'adequate procedures' in place to prevent corrupt practices by their employees or by third parties acting on their behalf. This is critical for mitigating the risk of bribery and for effective damage limitation.

'Adequate procedures' is the only available defence when bribery is uncovered. Although the Act does not define 'adequate procedures', the Ministry of Justice has issued Guidance to accompany the new anti-bribery legislation and help commercial organisations comply. The Guidance is high level, principles-based and non-prescriptive in character. The six key areas of focus are:

Principle 1: Proportionate procedures

Principle 2: Top-level commitment

Principle 3: Risk assessment

Principle 4: Due diligence

Principle 5: Communication
(including training)

Principle 6: Monitoring and review.



The Guidance makes it clear that these principles are intended to be flexible and outcome-focused and that any bribery prevention procedures should be proportionate to the level of risk.

Importantly, there is a clear message from government that the Guidance is not a checklist, nor is it intended as a safe harbour. Whether adequate procedures are in place will ultimately be a matter for the courts to determine, based on the facts of a given case.

What should your business do?

You need to understand your risk and scope your response.

Although applicable to all UK entities, the Act will be particularly relevant to commercial organisations operating in higher risk countries⁴. Some of the typical business transactions and dealings that create these risks are:

- sales transactions, especially those involving government or quasi-government entities
- movement of goods
- obtaining licenses, permits, regulatory clearances, and expediting bureaucracy
- negotiation of tax, duties etc
- other dealings with government⁵, including government concessions
- gifts, entertainment, travel expenses
- sponsorship and certain other marketing activities
- professional associations
- legal fees
- development banks
- outsourced accounting or tax services
- charitable or political donations
- certain kinds of Corporate Social Responsibility 'CSR' activity
- lobbying
- use of intermediaries including sales agents, consultants and distributors
- related parties
- joint ventures
- consortia
- mergers and acquisitions
- use of company assets by third parties.

In many ways the introduction of the Act could require a fundamental reassessment of the bribery risks that commercial organisations are facing and how those risks should be addressed. Commercial

organisations need to review their behaviour to ensure they are in compliance – and avoid being caught out.

Challenges

In considering what the Act means for commercial organisations operating in overseas territories, it has been necessary to make certain assumptions and to treat the countries that are the focus of this report as if each country is a homogeneous whole.

We appreciate this means that what follows could appear to be based on a number of cultural stereotypes. Whilst that is not our intention, it seemed important to address this issue at this point. With that in mind, we take this opportunity to stress that we realise that all countries and cultures are complex and multi-faceted. To the extent that we have been forced to base what follows on any broad generalisations, we have done so simply to articulate succinctly some of the important messages that we are seeking to communicate.

What the Act means for commercial organisations doing business overseas

Commercial organisations operating in overseas countries need to assess their risk exposure very carefully – the scope of the Act is broad, extending to:

Any commercial organisation registered in the UK and having operations in the UK or in overseas territories either through a subsidiary, associate or agent; and any commercial organisation registered in an overseas territory that does business, or is part of a business, in the UK.

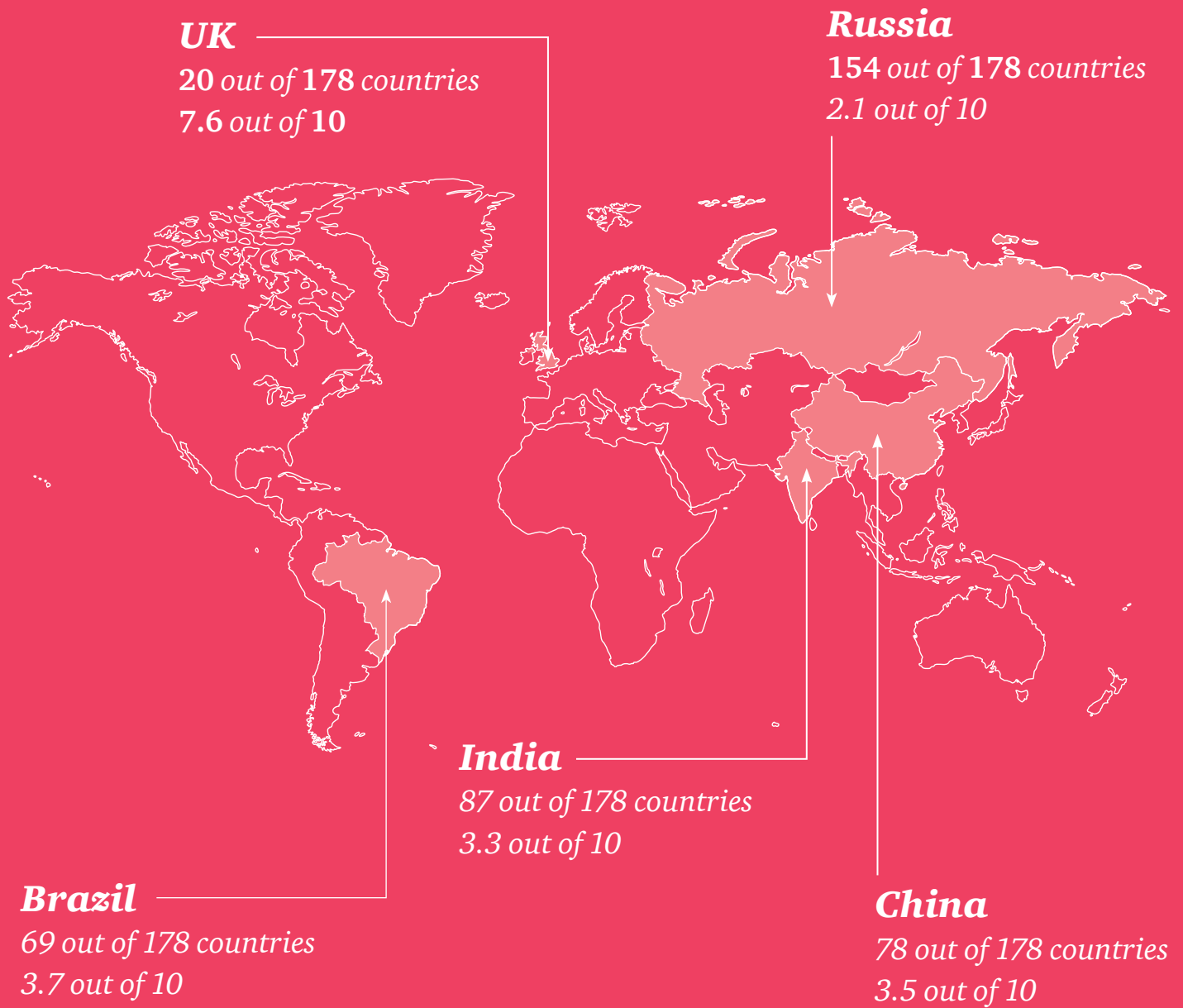
There is a potentially heightened risk attached to UK commercial organisations operating in overseas territories. Commercial organisations that have or wish to expand into emerging markets will need to ensure that they do not breach any of the Act's four key offences.

We define emerging markets as countries showing steady growth in Gross National Product per capita and those that are implementing economic or political reform programmes to increase their attractiveness to foreign investment. The fastest growing countries are usually grouped as 'BRICs' (Brazil, Russia, India and China).

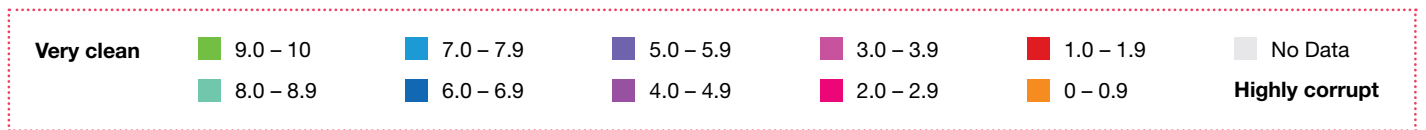
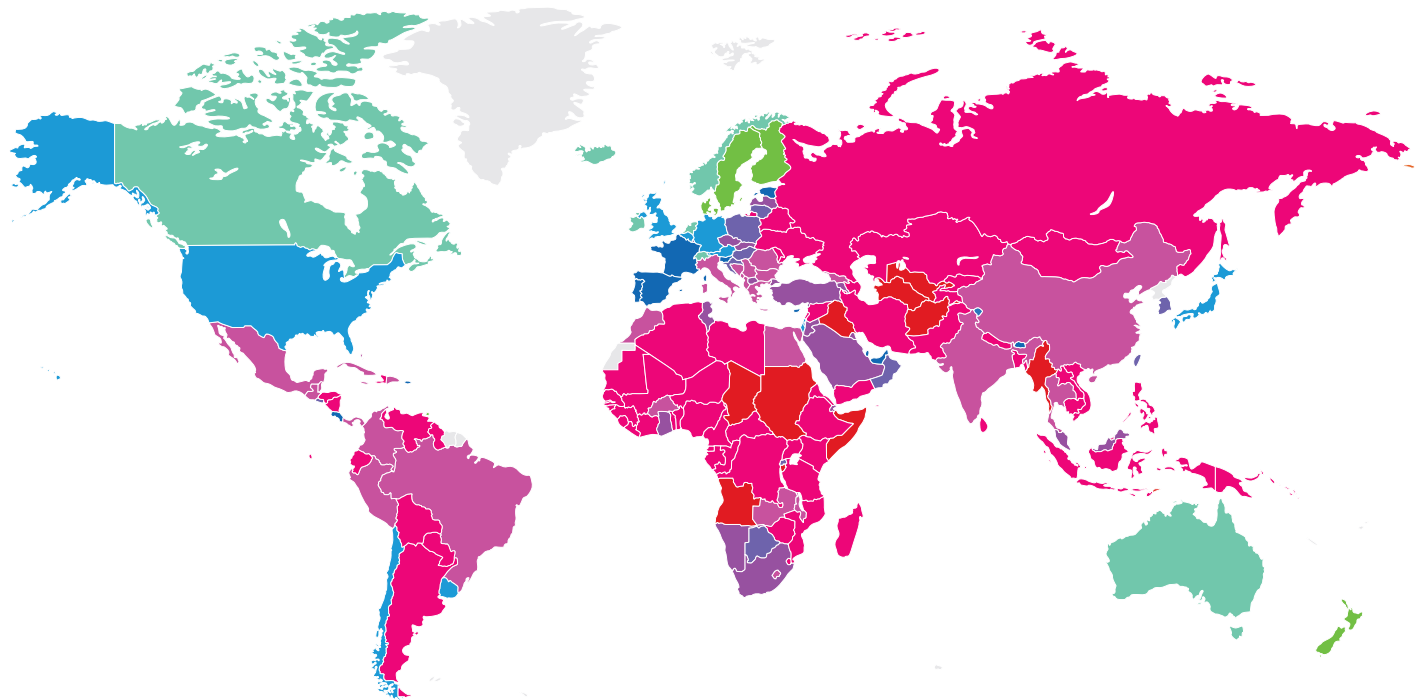
⁴ Reference made to higher risk countries are based on the study conducted by Transparency International's 2010 Corruption Perception Index. This measures the perceived levels of public sector corruption in 178 countries around the world on a scale of 0 (highly corrupt) to 10 (highly clean).

⁵ There seems to be a lack of understanding about the scope of 'government'. For instance, in some jurisdictions, this could include utilities, telephone companies, hospitals, development banks, sector regulators, and even companies on the Fortune 1000. The concept of mixed economy entities in certain territories means that the entity is partially owned by the government and the other part may be private or publicly-held entities.

The UK has fallen three places from 17 to 20 in Transparency International's 2010 Corruption Perceptions Index. The UK and the BRIC countries are ranked as follows:



Corruption Perceptions Index 2010 results



Source: Transparency International

Just because a territory is perceived to be of higher risk, it doesn't mean you shouldn't do business there...

Fast-growing emerging economies present outstanding opportunities for business. While we acknowledge that each country is different, certain generalisations can be made, as there are several business and cultural challenges that are common to each of the BRIC and other emerging economies. Some of the recurring risks may include:

- Lack of a strong ethical 'tone at the top' at senior management level, coupled with inconsistencies in actions, behaviour and words
- Many commercial organisations still do not have anti-corruption policies and procedures in place; and where policies and procedures are in place, there is often ineffective communication and inadequate training

- Fear of finding the 'unknown' is a major deterrent to conducting risk assessments. There is an underlying issue of form over substance and inadequately designed risk assessment procedures are widely viewed as 'tick box' exercises, rather than meaningful risk assessments
- Due diligence can be limited – or not performed at all; where it does take place, it can be driven by business considerations rather than risk issues.

Although these general risks can also be found within organisations in developed economies, they are more frequently encountered in emerging markets.

Business and cultural challenges faced by BRIC countries

As noted above, certain business and cultural challenges are relevant across many countries. However, some challenges could be specific to each of the BRIC countries:

Brazil

Compliance awareness has evolved significantly in recent years in Brazil. This is due to a number of factors including the increased global relevance of the Brazilian economy, and the increase in direct investments from foreign countries. In addition, several changes in Brazilian corporate law and the Civil Code are expected to introduce higher levels of corporate governance. However, even with the velocity of change in Brazil, there is still a gap in compliance awareness when compared to mature markets.

It is still unusual for commercial organisations in Brazil to have specific anti-corruption policies and procedures. The relative lack of risk assessment stems from a fear of finding the 'unknown'. Although larger commercial organisations have, in recent years, established risk assessment policies focused on Sarbanes-Oxley and internal controls, the risk of corruption has generally not been part of the scope of any such initiatives.

However, anti-corruption due diligence is a growing trend for inbound multi-nationals analysing potential investments in Brazil. With the coming into force of the Act, several UK-based inbound corporate investors and private equity groups have implemented anti-corruption due diligence programmes. These are also taking place where foreign commercial organisations are hiring local assistance, such as agents or distributors. Since intermediaries may be involved in corruption-related activities, UK-based commercial organisations, as well as entities with applicability to the Act, need to promote such exercises.

An anti-bribery and anti-corruption culture is not yet widespread in Brazil. However, this is changing, as many more government initiatives bring this issue to the attention of the media and to the



public at large. As things stand, anti-corruption risk monitoring and review at local entities is nearly non-existent and the difference between robust internal controls that mitigate risks and regular business activities is not well understood. The monitoring of corruption risk is rarely considered during the scope of local commercial organisations' internal audit plans.

Although some family-owned businesses in Brazil have grown into relatively large commercial organisations, many have yet to implement internal controls and basic compliance elements such as codes of conduct and whistle-blowing hotlines.

Certain trends are changing this. Because these organisations often rely on the capital markets and development banks for the resources they need to grow their operations, good corporate governance practices are being implemented in line with the requirements of the Stock Exchange and lenders. Levels of awareness of corporate governance have increased dramatically in Brazil during the last ten years, although there is still room for improvement.

With two large sporting events on the horizon (the 2014 FIFA World Cup and the 2016 Summer Olympics), as well as the discovery of large oil reserves near Rio, several major infrastructure projects are now underway. As well as increasing commercial organisations' interactions with government, the public tendering processes involved in these projects often also stipulate minimum requirements for the involvement of local commercial organisations. As a result, newcomers to Brazil may feel under pressure to align with local commercial organisations without undertaking the due diligence needed to understand whether local players can operate and maintain compliance with anti-corruption laws and regulations. This pressure may come in various forms, and the ability to demonstrate local content to meet the requirements imposed by public bidding processes is one of them. However, increasingly, important players are getting organised beforehand and implementing due diligence exercises in time to participate in these bidding processes.

Russia

Russia is making progress in addressing bribery & corruption risks. There is recognition at senior government levels, and within the business environment, that such risks have a negative effect on the country's ability to attract foreign direct investment and reduce capital outflows. Anti-corruption laws have been overhauled and the number of prosecutions of corrupt officials is increasing year on year. There is an increasing focus from businesses (and not just inward investors) on a compliance culture and ethical business practices. That said there is still a way to go to improve the perception of Russia as a trouble-free business environment.

Where Russia is concerned, a distinction needs to be drawn between bribes that enable business to take place, and bribes relating to the business being conducted. In the first category, a key business challenge in Russia can be the potential for extortive behaviour of the bodies that extensively regulate business across the country. This can take various forms, from the indirect to the very obvious. Payments are frequently demanded in order to accelerate the performance of duties by officials, which would otherwise be slow or refused for vague and ambiguous reasons. Examples include payments of facilitation to get goods and equipment into the country, offers to sign off official 'audits' without notices of violations in return for a special contribution and sometimes just pure harassment from enforcement authorities.

Whilst some organisations succumb to the temptation of 'faster, better' service through payment, many others who refuse to succumb find that they are inconvenienced – but not wholly disadvantaged. On the positive side, those organisations taking a firm stance are often quickly recognised by the extorters as 'not worth the effort'.

In the second category, it is not uncommon for commercial transactions to be affected by the payment of bribes by one or more parties. Not surprisingly, procurement is particularly susceptible, with payments required in order to be allowed to tender, to receive privileged information, or to be successful in a bid. These types of payments are relatively prevalent and strong controls and vigilance are needed to prevent them.

Other aspects of bribery that are particularly relevant in the Russian culture include:

- Gifts: relationships are critical to the conduct of business in Russia and gifts to generate and maintain good relations are common
- Hospitality: relationships can also be enhanced by taking business partners and government officials out for lunches, dinners and business trips, along with various sporting and artistic events. These events are sometimes quite lavish and can have the ultimate objective of obtaining an improper business advantage
- Use of subcontractors or intermediaries: frequently recommended by large customers, especially by state-owned commercial organisations, these can be a pre-condition for winning business
- 'Charitable' or 'sponsorship' payments: sometimes made by special non-profit organisations on behalf of commercial organisations to support current or former government officials or government initiatives, these may be viewed as a form of 'protection' money.

They highlight the need for constant vigilance, as well as adequate policies and supervision, when operating within the Russian business environment.

India

The economic growth of India since the reforms of 1991 has resulted in the dismantling of the power of State-owned enterprises and the 'Licence Raj', and has led to the creation of an increasingly dynamic private sector. This, together with a much more vocal, affluent, burgeoning, and aspirational middle class has pushed the combating of corruption to the top of the political agenda.

The existing anti-corruption legislation in India, the Prevention of Corruption Act 1988, made it an offence to receive a bribe – but not to offer one. Actions of the Supreme Court coupled with public letters from leading industrialists and prominent efforts of the civil society activists such as Anna Hazzare are forcing a public debate about the introduction of a new piece of anti-corruption legislation, the Lokpal Bill. With the alleged involvement of big commercial organisations in a spate of scams apparently weighing on his mind, Prime Minister Manmohan Singh on 21 October 2011 said government is considering changes in law to make private sector bribery a criminal offence.

All this is symptomatic of a significant change of mood emanating from the private sector. Even with the dismantling of the 'Licence Raj' and the privatisation of state-owned enterprises, the public sector remains one of the biggest employers in India and, as a result, the governance structure in the public sector has a far-reaching impact on how the country perceives corruption. It will take longer to address the causes of corruption within the public sector. For instance, one of the reasons that corruption is so prevalent in the Indian public sector is that its employees are poorly paid and it has often been accepted that salaries can be supplemented by low-value payments for routine, non-discretionary government approvals and services. When the Indian public sector is competing with a dynamic and constantly growing private sector, it is difficult for the government to match the salaries of its employees with those of the private sector. Collusion with agents, customers and vendors to obtain fictitious invoices and disguise such payments as mark-ups, commissions, stealth discounts or rebates is common.



Even for mundane tasks – from securing a birth certificate, a passport or a visa, to obtaining a construction permit or indeed one of the average 73 licenses needed to construct a building – ‘facilitation payments’ are required to navigate long waiting periods.

On a brighter note, technology is facilitating the change towards better governance. For example, in the area of real estate, where payments are commonly made to perform regular government jobs, states are moving towards electronic repositories of title records to cut down on human involvement and hence, on avenues for seeking payments. As good governance is increasingly being rewarded at the ballot box, one would hope that these practices will become more widespread.

Most companies entering India will engage with the private sector. The private sector is very much dominated by the ‘promoter’ culture where individuals or families own significant proportions of the company stock. Accordingly, the existence of a ‘boss-subordinate’ culture in India is widespread. Loyalties lean more towards family and friends in closely held family-run businesses, often leading to a non-transparent working atmosphere. At the same time, the Indian use of advisors and consultants is prevalent. Often such individuals are not formally engaged, but are instead friends of long standing or family members. This trend is also slowly but surely changing. There are a number of instances where companies that were traditionally family-owned and controlled are looking towards professional managers to manage their businesses.

In India, the giving of gifts is a way of life, custom and culture. Instances of lavish gifts at occasions such as festivals, promotions, weddings or other special events are frequent and common. Gifts can take various forms including offers of employment, charitable donations, political contributions, sponsorships, travel and accommodation and use of corporate assets. Refusal of such generosity may be taken negatively.

Nevertheless, Indian corporate life is led out in the open; corporate and social life intermingles and dynastic marriages are the norm. As such, it is easier to conduct diligence on corporations and promoters. However, there are instances where such promoters are running investments through family trusts which are very difficult to conduct any diligence on. The country follows a common law approach and the court systems are robust, albeit slow.

A final and relevant issue is worth mentioning. Candidates have been known to alter their qualifications in order to make them appear eligible for jobs. Anecdotally, it is estimated that some 25% of all applications have some ‘material discrepancy’ contained within. With large-scale recruitment of candidates not in possession of strong ethics and fundamental values, the risk of them committing fraud and corruption while on the job is significant. There is also a tendency to cover up mistakes and report only what one ‘wants to hear’ rather than ‘what is true’.

China

The business environment in China has become much easier for international commercial organisations in recent years. Chinese businesses and officials are increasingly aware of international business practices, and have gained experience from working with non-Chinese counterparts. However, there are still key differences in the approach to business that can cause difficulties for UK commercial organisations looking to work with Chinese counterparts.

Forming a relationship before agreeing a deal remains an important part of the business process. The role of relationships in China is often referred to by its Chinese name, ‘Guanxi’. This forms an important part of cultural and social practices, as well as commercial behaviours, and the competitive environment means that such relationships are often seen as a way of getting ahead.

There can be a tendency to look for ways to do business with family and friends, and in some circumstances a relationship may not be regarded as close until a way of doing so has been found. As business with friends and family can be quite common, staff and counterparts are less likely to feel it necessary to declare such interests to their employer.

The concept of ‘Guanxi’ does not necessarily relate to cash or gifts, though the exchange of favours can be used to build good ‘Guanxi’ and payments to facilitate the conduct of business do occur. Relationships can be seen as assets that can be bought and sold.

The giving of appropriate gifts is quite common during meetings, not to mention traditional holidays. While this practice is sometimes seen as a way of building and maintaining business relationships, common sense should be employed with any gifts given or received, and it should be remembered that gifts do not necessarily need to be substantial to breach anti-bribery laws.

Building good relationships in the supply chain is generally positive, but UK businesses must be aware of the risks involved, such as conflicts of interest, fraud and kickbacks.

While much progress has been made in business practices and in opening up the country to oversee trade, Transparency International’s assessment of China in its Corruption Perceptions Index has remained more or less static for the last 10 years at 3.5, placing China 78th in the world rankings. This means that commercial organisations doing business there should be constantly alert to the potential risks involved.

Facilitation payments are common. Third-parties may often not be aware that these are unacceptable under UK law, and so may make payments on an organisation’s behalf without realising that this is problematic.

Cultural considerations also need to be factored into how training and messaging with staff are addressed. Chinese organisations tend to be hierarchical, and staff members are less likely to question senior management decisions. This can mean that western-style control systems will be less effective. Also, when problems and issues are known about, they are less likely to be disclosed.

It is also important to remember that although the Act may make explicit reference to foreign officials, in China the difference between officials and businessmen can be blurred, particularly by the role of government/state-owned enterprise in the economy.

Managing the risks – recommendations

Acting promptly to address any gaps or areas of weakness identified in your anti-bribery programme could be your only defence. The following principles should all be areas of special focus:

Principle 1: Proportionate procedures

The Ministry of Justice guidance summarises the principle of proportionality as follows: ‘A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.’

Large, complex multinational commercial organisations with high-risk profiles need to ensure that they are investing enough resource in their anti-bribery programmes.

Smaller organisations with less complexity and/or resources are not expected to build programmes and controls with the same level of sophistication. Commercial organisations with genuinely lower risk exposures also need not go over the top.

That said, no business is entirely devoid of risk, so doing nothing is not the answer.

Proportionality will govern the scope of, and approach to, other areas such as:

- codes of conduct, policies and guidance
- compliance-sensitive transactions including gifts, hospitality, charitable and political donations
- organisational structures, accounting and reporting lines
- the risk assessment process and the manner in which this is documented
- third-party due diligence
- human resource controls around hiring and promotions
- sanctions and rewards for officers and employees
- accounting and record-keeping controls
- authorisation and delegation controls
- monitoring and enforcement
- periodic compliance certifications, not only from employees but also with third parties/intermediaries
- auditing and review
- reporting and whistleblowing
- internal and external communications.

Are you confident that your bribery risks have been identified and adequately addressed?

Principle 2: Top-level commitment

The ultimate success or failure of an anti-bribery programme will depend on the culture of the organisation and whether people believe that ethical behaviour matters to the way they are evaluated and rewarded.

Are your board members and senior executives 'walking the talk'?

To demonstrate their commitment to fostering an anti-bribery culture within the company, board members and senior executives need to consider a number of issues:

- senior management must indicate the importance of the anti-bribery programme by allocating resources to its development
- the board should devote appropriate time to anti-bribery compliance issues and to monitoring the effectiveness of the organisation's anti-bribery programmes and controls
- specific compliance-related performance targets could be set in management objectives (including those of board members) and then assessed as part of the variable remuneration decision process
- board members and other senior management should undergo training to ensure they have appropriate knowledge of the anti-bribery legislation and its implications.

Principle 3: Conduct a comprehensive bribery risk assessment

The Ministry of Justice guidance states that: 'An initial assessment of risk across the organisation is ... a necessary first step.'

Without having assessed what risks exist, how can they be effectively managed? Once a risk assessment is completed, the organisation is in a much better position to decide what measures need to be taken. It should be remembered that risk is not necessarily proportionate to the size of the company, And it is not a 'one-off' exercise – risks can change over time.

An undocumented risk assessment will be of little value if or when an incident occurs and there is a requirement to evidence the way in which risks were managed.

The risk assessment should examine a range of risk factors. The Ministry of Justice guidance identifies five generic types of 'external' factors:

- country
- sectoral
- transactional
- business opportunity
- business partnership risk.

Some of the areas that the risk assessment would typically cover include:

- the high-risk locations in which the company operates
- whether the business model includes large-scale projects, tenders or long-term contracts
- the degree to which intermediaries are used to do business
- whether the company has interactions with government officials
- if a new business acquisition or joint venture is planned
- the gifts, hospitality and entertainment activities employed.

A bribery risk assessment should be repeated periodically to ensure that the company's procedures continue to be relevant.

Principle 4: Due diligence

Companies are exposed to vicarious liability for the actions of others (referred to as 'associated persons') who pay bribes of any kind while doing something on their behalf. An associated person is defined as an individual or an incorporated or unincorporated body who 'performs services' for or on behalf of the organisation. Associated persons may include employees, agents or subsidiaries.

Integrity due diligence: The degree of control that the organisation has over the existing relationship with the third-party should also be taken into consideration; in particular:

- it is essential that risk-based compliance due diligence checks are carried out on any third-parties that the organisation plans to engage
- formal contracts with these third-parties should require them to behave in an ethical way and in compliance with all relevant legislation, including specifically anti-bribery legislation
- approval and monitoring procedures need to be established to check that payments made to the third-party appear reasonable in relation to the service performed
- where they are engaging smaller third-parties, large organisations should consider taking steps to support these smaller business partners in achieving compliance with anti-bribery laws and regulations.

Employees: HR should be conducting background checks on potential employees, particularly those in senior or sensitive positions, looking out for evidence of involvement in illegal activity or any other question marks regarding integrity.

Mergers, acquisitions and joint ventures: Acquiring a business or entering into a joint venture exposes an organisation to the risk that it may unwittingly take on liability for the illegal acts of the target business or of a partner in the investment. Alongside the usual financial, commercial and legal due diligence typically conducted in such situations, organisations should consider steps to obtain insight into the risks, behaviour and compliance programmes of such targets and joint venture partners. The circumstances of a given transaction will dictate the extent to which such due diligence is feasible prior to the transaction. After completion, further work will be required to integrate the new business or entity into the wider organisation and harmonise anti-bribery policies and procedures.



Principle 5: Communication (including training)

The vital foundation for any anti-bribery framework is effective communication of the code of ethics or conduct, the organisation's core values and its supporting policies.

Some things to consider whilst preparing for the training:

- for training to be effective, it should be regular rather than once-only and participation and feedback should be monitored and evaluated
- employees need training to help them understand how bribery and corruption can arise and to identify situations when they and the business may be at risk
- because of the often subjective nature of the material, face-to-face training is necessary to supplement e-learning modules for people in critical positions
- training must be tailored to reflect realistic dilemmas staff may face, as well as the needs of particular roles.

Principle 6: Monitoring and review

Monitoring and review activities are critical to understanding whether the anti-bribery programme is really working.

Monitoring and review can be thought of in two ways:

- there are retrospective measures to review adherence to policies in respect of existing transactions and relationships, such as might be carried out by an internal audit or similar function
- there are real-time monitoring activities involving the gathering and analysis of current information about what is happening in the business, with a focus on activities which have been identified as high risk through the risk assessment process.

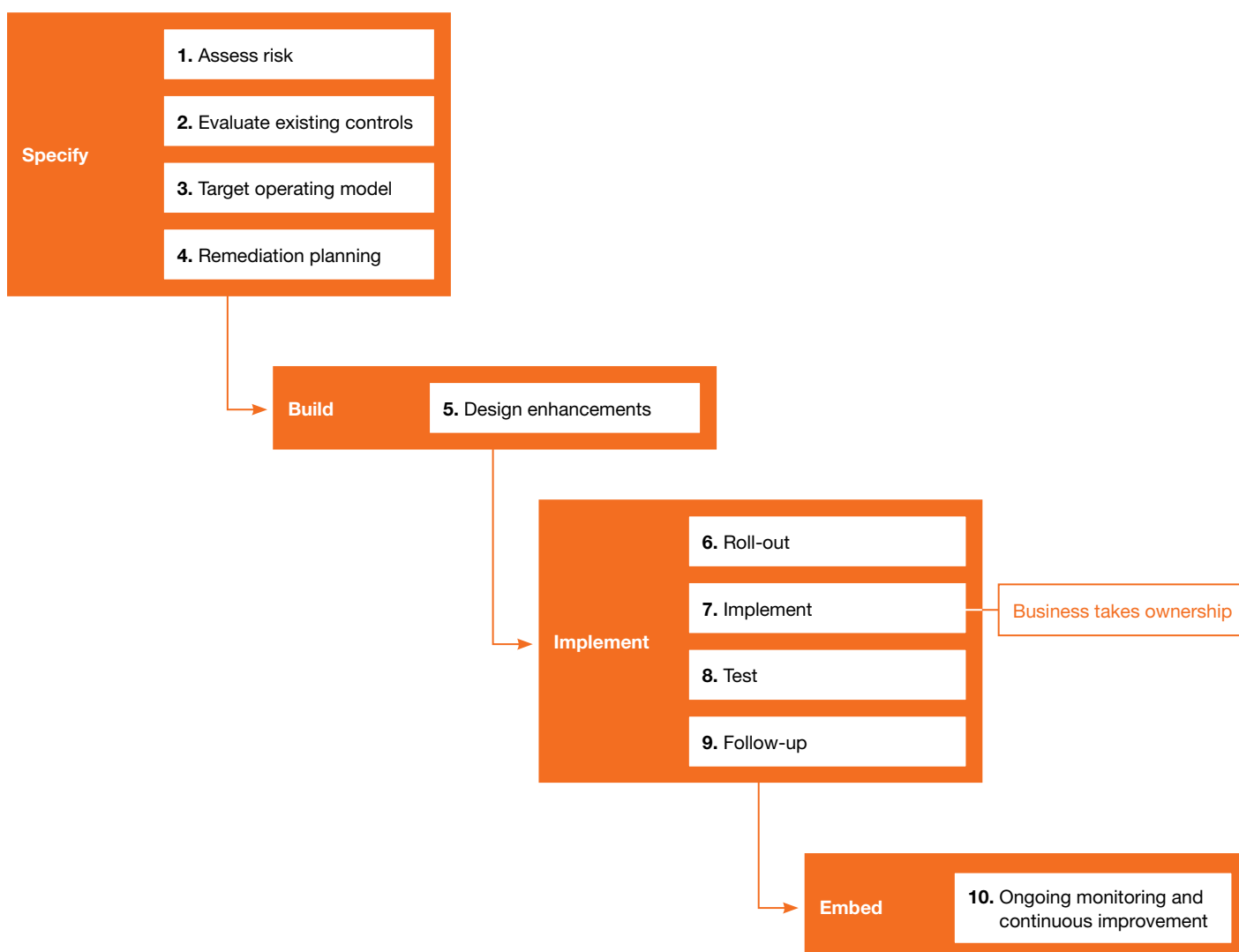
Both of these may have a role in implementing effective monitoring and review.

Whistleblowing: Best practice guidelines for countering bribery and corruption typically require provision of whistleblowing facilities. This involves establishing a mechanism whereby individuals can report any suspicion of corrupt behaviour confidentially and, if they wish, anonymously.

Committing time and resources: The need for organisations to commit sufficient time and resources to the development and embedding of an appropriate anti-bribery programme has already been highlighted, but it is worth emphasising again.

Implementation steps

PwC has developed a 10-step implementation plan that will help organisations address all six of the Ministry of Justice principles



Corporate hospitality and facilitation payments

Reasonable, bona fide and proportionate corporate hospitality is allowed. Facilitator payments are not. The Revised Guidance makes it clear that hospitality and promotional expenditure are acceptable. However, there should be no intention for a financial or other advantage to influence the recipient in discharging their role, and the event should not be 'lavish'. Unfortunately,

'lavish' is not defined and will, therefore, be open to interpretation. Organisations should consider what is reasonable and ensure that their policies and procedures are properly communicated to an employee.

It is also clear from the Act and the Revised Guidance that facilitator payments (small payments made to

facilitate routine action) will be considered bribes for the purposes of the Act. However, the Revised Guidance does recognise that the eradication of facilitating payments will be a long process and hints at the potential for prosecutorial discretion to be exercised where facilitation payments are discovered.

Recommendations to manage risks

Some recommendations for risk mitigation are set out below. Although these suggestions can be applied universally and are not country specific, we have drawn on our experience to show what they mean in practice in each of the BRIC countries:

Brazil

Doing business in Brazil should be understood to be filled with bureaucratic constraints, a complex tax system and a complicated labour regulatory environment. Local people as well as corporate businesses try to cope with these challenges by finding alternative ways to resolve issues or deal with certain regulatory constraints. This can result in creativity or flexibility in finding solutions and does not always have a negative context, although finding 'the way' may not always be legal or ethical.

The dramatic growth of Brazil's economy has increased the size of its middle class. Such growth is creating a new employment sector eager to take on new roles in the job market. It is therefore critical that investments should be placed on furthering the professional duties of potential candidates.

It is important to mention that Brazil follows the 'civil law' system, with decisions being based on the application of statutory laws such as the Brazilian Federal Constitution, as well as several Codes, laws, decrees and other rules. Where there is no specific statutory provision, the courts may decide on the basis of analogy and general use and customary policies. In contrast to 'common law', there is no requirement for written clauses in contractual agreements where the provisions can be found in written legislation.

Commercial organisations must create strong policies related to anti-bribery and compliance. Internal Controls departments must ensure employees act in accordance with them. Punishments, including dismissal, must be applied to employees that violate those policies. As significant importance is placed on relationships in Brazil, a policy should be implemented to ensure that those relationships in the workplace are kept above board and conflicts of interest, as well as related parties, are disclosed and monitored.

An entity should designate a responsible person at a senior level to effectively implement the policies. For internal controls to be effective and functioning as designed, proper segregation of duties should be ensured.

These should be periodically checked in order to monitor their effectiveness.

Considering cultural norms, as well as the ever-changing and improving landscape of corporate governance, policies and training should include explanations about what constitutes acceptable business practices and conduct, as well as explaining what is not acceptable. This theme should be included in the frequent messaging, not just during annual training and disclosures of conflicts of interest.

Russia

There is no real need for organisations that are new to the Russian market to conduct their business any differently to the way they would 'at home'. However there is a clear need for senior management caution in business dealings to address the corruption challenges. The key areas for executive focus are creating a culture that does not tolerate or condone bribery, defining clear approaches to working with local business partners, effective guidance on gifts, hospitality and 'favours' and regular reviews of existing practices.

Creating a culture that does not tolerate bribery: As corruption is prevalent in certain areas, senior management need to adopt a clear zero-tolerance of bribery and corrupt activity from day one. This needs to be backed by clearly defined policies and guidelines. And senior management need to be seen to be active in addressing the risk and 'walking the talk'. The Russian management culture can be viewed as quite hierarchical and directive driven so a clear lead from the top is essential. Keeping bribery and corruption risks on the agenda in staff discussions and during day to day business activities will help reinforce this message and create an understanding of why ethical business behaviour is a priority to the organisation.

Working with local business partners: For very good reasons, not least language and the vast size of the country, foreign businesses often need to conduct business in Russia through local business partners or other intermediaries. Under the Act, a UK party may now be held liable for the corrupt behaviour of an overseas intermediary. Where a Russian intermediary is conducting business in Russia on behalf of a UK principal. Special emphasis needs to be placed by senior management on the activities of those business partners. A thorough due diligence process is essential before working with intermediaries. And this should be backed up with senior

management involvement in overseeing business partner activity. A common pitfall is to devolve this responsibility due to language or logistical reasons.

Establishing relationships: it is common in Russia to use gifts, hospitality and favours to help establish business relations. This does not need to be lavish entertainment or major 'back-scratching'. A clear set of standards that is widely communicated to all management and employees can help ensure that an appropriate gift or business favour is not a bribe. Many organisations in Russia are now ensuring that there is a pre-approval for all such expenses above certain designated limits.

Regular reviews: Due to the somewhat hierarchical and directive driven culture of many Russian organisations, regular reviews around the business areas prone to corrupt activities can have a strong prophylactic effect on behaviours within the organisation when performed in conjunction with appropriate messaging.

India

The focus of senior management should be on implementing a 'zero-tolerance' anti-bribery policy. To effectively implement the anti-bribery policy, an entity should designate a responsible person at a senior level. Measures including an effective 'Tone at the Top', adequate training, regular communication and periodic refresher courses will ensure an adequate mechanism to deal with the menace of bribery. As a measure of effective deterrence, employment contracts should contain a specific clause on compliance with the entity's anti-bribery policy. The designated authority should also strive to include the anti-bribery clause in contracts with all third-party agents/consultants.

To ensure effective internal controls, there should be proper segregation of duties within the entity, as well as a 'maker-checker' concept in key decision areas. The authority and responsibility of each employee should be well defined. The entity should strive to introduce effective monitoring systems and adequate whistleblowing and reporting investigation procedures.

An effective control mechanism will include regular and periodic risk assessments of the existing anti-bribery programme to test its effectiveness. A good anti-corruption policy should ideally include due diligence procedures for vendors and third-party agents/consultants.

It is advisable to keep intermediaries to a minimum, as fewer parties involved will

Do you know your ABC?

Elements of an anti-bribery compliance framework



make operations more efficient and reduce risk. Businesses should conduct due diligence on their local representatives, agents and key staff and ensure that remuneration is at market rates.

The entity should have a well-articulated policy on gifts, employee expenses and hospitality. Any offer or receipt of gifts and hospitality without a genuine business reason should not be permitted by the entity's policy. The policy should also address the issue of charitable donations and sponsorships to prevent any inappropriate use.

China

The key to avoiding unnecessary risk is to keep the business sense that would be employed in any other market. While there are differences in business culture, most troubles arise when UK commercial organisations in China deviate from practices they would be comfortable with in other markets. Be careful not to offend people, of course, but stick to what you need to do and what is sensible. Having clear policies in place is also important to show that you have taken adequate procedures if any problems are encountered.

Guanxi: Relationship building will continue to be important, particularly for foreign businessmen who need to prove a deal is win-win. There is nothing necessarily wrong with this, but British commercial organisations must not forget

their basic business principles and good practice in the name of relationship building. Take time to form relationships, but if the deal is genuinely good for both sides, nothing else should be necessary to seal the deal.

Due diligence: Determine who you are doing business with and, in turn, who they are doing business with. Ensure that proper due diligence is conducted to check that any partners or third-parties are reputable. Check whether business is being done with family and friends of staff and third-parties.

You may need Chinese parties to sign up to certain standards of practice, and also cooperate with due diligence background checks. Because your counterpart may not be used to this practice, you will need to be sensitive and may need to broach the issue carefully – but important checks should not be skipped to avoid offence.

Gifts: Gift-giving is common in China and, within reason, it is not outlawed by the Act. However, commercial organisations should have clear policies on appropriate sizes of gifts, and what gifts are and are not acceptable. Do not feel compelled to give them.

Facilitation payments: Be brave enough to refuse to pay facilitation payments. Clear guidelines on this will help. Facilitation

payments may be standard practice for the people you are working with, so explain carefully to third-parties and partners that it is important these are not paid on your behalf.

Dealing with staff: 'Tone from the top' and 'mood in the middle' are both critical. As with other BRIC countries, in China it is important to ensure that there are clear rules and regulations around what is acceptable – and what is unacceptable. Top-down policies are essential and a 'zero-tolerance' anti-bribery policy should be implemented. This needs to be clearly communicated to local staff, and the necessity for measures should be explained carefully and patiently. Engage with staff to check that messages have been taken on board. This also applies to working relationships with any third-parties.

How can we help?

At PwC we have the right skills, experience and expertise to advise our clients on the particular risks and responses for your organisation. We have developed a number of specific diagnostic offerings of varying degrees of depth, tailored to client needs and we can provide practical assistance in helping with facilitated bribery risk assessments using BRiskTM – our unique web-based diagnostic tool.

We also have extensive experience in helping organisations prepare for this legislation and from conducting similar FCPA (Foreign Corrupt Practices Act) reviews and remediation.

Simply implementing an Anti-Bribery Policy is not enough. An organisation needs to ensure it has an Anti-Bribery Compliance Programme that is capable of evidencing ongoing and up-to-date controls and one which can communicate effectively, ensuring a strong ethical culture within an organisation. Implementing an effective Anti-Bribery Programme can be a significant undertaking. The difficulties and time it takes to embed processes and change cultural norms should not be underestimated. The stakes are potentially high and the time to act is now.

For large and complex anti-bribery and corruption projects, where clients need legal as well as professional advice, we are uniquely equipped to provide both as a seamless service by teaming with PwC Legal. Working closely with our colleagues in PwC Legal, we have the experience to structure relevant anti-bribery and corruption advice so that it attracts legal professional privilege.

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The Brazilian Chamber of Commerce for Great Britain, the Russo-British Chamber of Commerce, the UK-India Business Council, and the China-Britain Business Council have joined efforts with PwC to produce this brochure to inform UK commercial organisations operating in BRIC emerging markets of the preparations they should make in light of the recently enforced UK Bribery Act.

This collaborative approach seeks to respond to concerns among the business community while acknowledging the wide-reaching geographical interests of UK businesses. We hope it has been informative and helpful.

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