

## **New First Principle of Adequate Procedures: Proportionality**

One of the more noticeable changes in the UK Bribery Act Guidance released last month and the Consultative Guidance, released last September, is found in the Six Principles of an Adequate Procedures compliance program. The Consultative Guidance listed Risk Assessment as Principle 1. However, in the recent final Guidance, Risk Assessment has moved to Principle 3 and the new Principle 1 is Proportionate Procedures, which is defined 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.*

Adequate bribery prevention procedures ought to be proportionate to the bribery risks that a company faces and a company still must assess these risks so an initial assessment of risk across the company is, therefore, a necessary first step. However, proportionality is overlaid above and across all the remaining Principles so if a company has a low risk profile, it may not need as robust an anti-bribery compliance program as a company with a higher risk profile.

The Guidance makes clear that although the level of risk will be linked to the size of the company, and the nature and complexity of its business, size will not be the only determining factor. Small businesses can face quite significant risks and will need more extensive procedures than other businesses facing limited risks. However, small businesses are unlikely to need procedures that are as extensive as those of a large multi-national company.

The level of risk that companies face will also vary with the type and nature of the third parties it may have business relationships with. For example, a company that properly assesses that there is no risk of bribery on the part of one of its associated persons will, accordingly, require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a company in negotiations with foreign public officials may be assessed as significant and, accordingly, requires much more in the way of procedures to mitigate those risks. Businesses are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

So what does this mean in practice? Since Proportionate Procedures is Principle 1, it takes precedence over all others. I recently attended a conference by Hanson Wade where one of the speakers discussed this concept of proportionality. Based upon his remarks and the text of the Guidance, I have created the following chart to provide some interpretation of what this may mean in practice for various sales models that a company may have in place.

<b>Company Sales Focus</b>	<b>Contract Language</b>	<b>Questionnaire</b>	<b>Level One DD</b>	<b>Level Two DD</b>	<b>Foreign Law Firm Review</b>	<b>Level 3 DD</b>	<b>Foreign Business Partner Training</b>
Large Multinational	Yes	Yes	Yes	Yes	Yes	Likely	Yes
Large UK Exporter	Yes	Yes	Yes	Yes	Yes	Maybe	Yes
Significant UK Company	Yes	Yes	Yes	No	No	No	No
EU Only Sales	Yes	Yes	Yes	No	No	No	No
UK Only Sales	Yes	No	No	No	No	No	No

The left hand column lists the type of business which may be subject to the Bribery Act. The categories across the top are the types of risk tools a company can use to manage its risks.

- **Contract Language** This means legal terms and conditions which protect the company to the greatest extent possible from a foreign business representative engaging in conduct violative of the Bribery Act.
- **Questionnaire** - This means that both the business person who desires the relationship and the foreign business representative commit certain designated information in writing prior to beginning the due diligence process.
- **Level One Due Diligence** - This is an electronic database search of the relevant UK and US lists of known criminal, terrorists, money-launderers, etc., it should be used for foreign business representatives in low risk countries only.
- **Level Two Due Diligence** - This is an electronic database search in the home country of the foreign business representative and should be performed in conjunction with a Level One search for all foreign business representatives in medium to high countries.
- **Level Three Due Diligence** - This is a “boots-on-the-ground” due diligence investigation. It can include an interview of the proposed Foreign Business Party, its references and bankers, a review by the Commercial Attaché of the appropriate UK Ministry. It should be used in high risk countries and/or when Red Flags cannot otherwise be cleared.
- **Foreign Law Firm Review** - This is a legal review of both your company’s proposed Foreign Business Partner contract and a legal Memorandum of the rights and obligations of entering into such a relationship in the country in question.
- **Agent Training** - Where your company should provide anti-bribery training to its Foreign Business Partners.

Many have decried the final Guidance as a cave-in by the UK Ministry of Justice, to UK business interests, to soften, if not gut, the Bribery Act. However, we believe that this Principle of Proportionate Procedures inserts a component of reasonableness due to the fact that what may be appropriate a world-wide multi-national company is not necessarily needed for a UK company selling primary, if not exclusively, in the UK or even in the EU.

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