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Cracking down

Michael Littlechild GoodCorporation

Who wants to be involved with a business exposed for corruption? Surely, the answer must be 'no one'. Boards should be taking a closer look at how their business is keeping on the straight and narrow, says Michael Littlechild.

Corruption is moving up the corporate agenda, as we can see from the increasing amount of dirty linen on display in both the business as well as the popular press.

So does increasing coverage mean there is more of it going on? Is all this talk we hear today about corporate codes of ethics just a lot of bluff?

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The answer, in fact, is no – quite the opposite. There is little doubt that many companies which once turned a blind eye to dubious practices in far-off countries have gone a long way towards cleaning up their acts. With company ethics now firmly under the spotlight, practices that a decade ago would have been dismissed with a resigned shrug of the shoulders, are now considered seriously damaging to an organisation's reputation.

Legislators are trying harder than ever to bring erring companies to account. One after the other, countries have replaced worthy but vague principles with purpose-built anti-corruption laws which have made the rules clearer and prosecution easier. That's been seen most notably in the US with its Foreign Corrupt Practices Act (FCPA), but strong legislation has also appeared in many European countries. So where has the UK been on this? Well, with the latest legislation dating back to the government of Herbert Asquith, not exactly at the leading edge.

Now, this is all set to change. A draft Bribery Bill, though long in the making, was published earlier this year and businesses, for a change, are welcoming more regulation. Anything to make things clearer and to ensure that the unscrupulous are not allowed to gain an unfair advantage over the virtuous. Nothing is certain yet, and the legislative timetable may well bump up against a general election. One would hope, though, that even with a change of government an issue such as this is bi-partisan enough to warrant only a postponement, rather than cancellation.

What is proposed in the draft bill are two general offences of offering and accepting bribes, plus a specific offence of bribing foreign public officials, equivalent to the US Act (which oddly confines its definition of corruption to unethical dealings with foreign public officials). Also proposed is a new corporate offence, whereby the misdemeanours of an employee become those of the

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company if there has been negligent failure on the company's part to prevent the corrupt act.

Spicy stuff
What this means for businesses and the boards that govern them might at first seem straightforward enough.

That the venal will be penalised, both givers and receivers, hardly takes much understanding. The outlawing of corruption of public officials is also easy to grasp, though it may prove a little more tricky to interpret – US companies have fallen foul of the FCPA for quite innocent reasons, like sponsoring ministerial participation at a conference. But it is the new corporate offence that should add the real spice. If the courts cannot see that good management practices to prevent corruption have been applied, it will be easier than ever before to prosecute the company. Conversely, if a company does a good job in minimising the risk of corrupt behaviour, the courts will punish a misbehaving employee, not the company.

All this poses two key questions. What constitutes good practice in avoiding corruption and all its messy consequences? And how does the board make sure it is being properly followed?

To address the first, many companies focus upon issuing a code of conduct or similar statement of principles, and obliging employees to sign that they have read and understood it. So, everyone understands the policy and the company has evidence that the effort has been made. Sounds simple enough, and no one can deny that this is a useful thing to do. But this should surely be only one element of a serious anti-corruption policy. From our assessments of ethical business practice we would highlight a number of more substantive activities that should be firmly in place in order to protect an organisation from falling foul of corruption.

Setting employees straight
It should go without saying that employees are clear about a zero tolerance of bribery but there are some grey areas to focus on for employees, notably gifts and entertainment policies and conflict of interest.

In our experience, clear guidance on these areas is often neglected in employee communications. There should be an easily understood policy on gifts and entertainment, which makes it clear not just what can be given but also what can be received. This is still quite vague in many companies. Everyone has a personal view of what constitutes 'influencing a business decision', so the rules must be clearly spelt out. Employees should also grasp what conflict of interest means – it is a woefully misunderstood concept, especially in countries where the people qualified to work in business live in a relatively small world and where employees often find they have friends or relatives among their suppliers, their customers or even their regulator.

Employees should also be aware of commercial confidentiality. There should be adequate electronic and physical security on information, as it is often this commodity that is bought and sold, not just contracts.

It is also important that honest employees know that it is their duty not just to decline temptations from third parties, but to report them to senior management. The matter can then be addressed with the management of the offending company with a very strong message.

Safeguarding suppliers
Relations with suppliers trying to win business are obviously a key sensitive area.

The draft bill, in fact, is more lax towards companies whose employees accept (as opposed to offer) bribes, as companies will not be held culpable for employees on the take from suppliers or anyone else. Nevertheless, it would be a strange approach to neglect sensible measures to minimise the risk of decisions being taken against the company interest by unethical staff.

There should also be strong communications to suppliers on expected behaviour, with a clear message that misbehaviour will be met by sanctions. There is nothing like the threat of exclusion from bid-lists for smartening up unscrupulous suppliers'

acts. And yet this happens extraordinarily rarely, even in business environments where corruption is commonplace.

Ticking off suppliers is secondary, however, to having a robust procurement process that gives corrupt individuals, inside and out, a tough time. Separation of powers to approve procurement decisions means that suppliers need to corrupt not one but many, which makes it decidedly more difficult. Senior management should be wary where suppliers have been continually re-engaged with little attempt to explore the alternatives. Single sourcing without competition is sometimes inevitable, but should be surrounded by extra safeguards and challenges. To further reduce the potential for collusion, separation of duties should also apply to the acceptance of goods delivered and of work completed, as well as to approvals of invoices.

Clarifying customer relations

Relations with customers also need careful thought. Customers can bribe as well as suppliers, generally to gain advantages in pricing or service levels. A well-controlled pricing policy is essential here, with procedures and business cases for approving discounts.

Reasonable levels of customer entertainment will always be part of business life, but should be able to stand up to external scrutiny. One hesitates to propose the national press as an arbiter of ethics but it can help to imagine your entertainment activities plastered over the front pages.

Bids for major contracts need a specific approach. Bid spending is often necessarily high and worthwhile commercially for big deals, but the rules of engagement should be clear and the accounting fully transparent.

Managing intermediaries

The use of intermediaries, or agents, to negotiate between a company and potential major customers is fraught with peril.

Companies have sometimes blamed dubious practices that have come to light on agents exceeding their remit. This is unlikely to be accepted as an excuse under future legislation, especially if the company has been vague about the remit. There needs to be detailed coverage of an agent’s activities in its contract and, again, transparent reporting of expenses. And the same watchword applies to agents as to employees in sensitive positions: choose them very carefully in the first place.

Public officials

Contrary to the definitions in some countries’ legislation, public sector bribery is not the only case of corruption, but it is a special case.

In dealing with public officials the management disciplines are in principle the same but companies are beholden to the public sector as to no other party. The practice of lobbying is not unacceptable but should follow the general rules on customer and supplier relations and should be kept to business matters. Lobbying is best done, as far as possible, through an industry association to avoid accusations of special favours.

It should go without saying that payments to public officials are forbidden, and there should be no further toying with the spurious distinction between bribes and ‘facilitation payments’. These are properly regarded as synonymous in the draft Bill. Where, as sometimes happens, governments insist on a company funding some social or infrastructure project as a *quid pro quo* for winning a contract or licence, it should be clear that this proposal has been open to all bidders and that the proposed infrastructure is both public and worthwhile.

Businesses are fond of proclaiming their stance on corruption. They should also visibly support those governments that set up policies and institutions to combat corruption. There may be a case for cynicism with some governments’ policies but where they do not exist, or are ineffective, the corporate sector should engage with governments to encourage progress. Too many currently sigh in private or, worse, thwart the efforts that are made by giving in to obstructive officials.

Where the board comes in

All the above sounds remarkably like sound business practice that should be adopted in a perfect, corruption-free world.

It is no more than that. The deficiencies GoodCorporation encounters as part of its assessments of corporate practice amount to the simple failure to put these straightforward controls in place. We routinely see companies failing to get beyond a finely written Code of Conduct, and failing to put in place consistent processes that would underpin and embed that code. In some cases, these failings may be happening because the company does not really care a jot about business ethics and believes in business success at all costs.

Let's leave these aside as incorrigible and assume their officers are destined for jail. The others which are failing – and these are the great majority – are doing so through neglect rather than ill will.

To avoid this, the companies most advanced in this area have embedded a robust company-wide anti-corruption policy. By policy I mean not only the conduct statement referred to earlier, but all the back-up in terms of controls, communications and checks and balances to make sure the conduct fits the code. It is clear from the canter through best practice above that the job of getting this right belongs to no one person in a company, so the potential for things falling between the cracks is large. The practices which should be in place belong to the remits, at the very least, of sales and marketing, purchasing, human resources, finance and public affairs. These are all represented on the board in one way or another.

What the board as a whole needs to know is that all these different elements are being covered effectively, and that someone is coordinating them. That someone could well be the company secretary, as it fits naturally with the secretary's remit of ensuring that directors' responsibilities are being cared for. It could otherwise be delegated to another person, as long as their role is sufficiently broad in scope.

The board needs assurance that the policy encompasses all the functions and procedures which could be subject to malpractice, that these have been reviewed and deemed fit for purpose and that responsibility for each is clear. It also needs to know that there are effective processes for alerting them that something has gone wrong. Companies subject to the requirements of the Sarbanes-Oxley Act should already have whistle-blowing procedures in place, but many others have not. In any case, many existing processes resemble defunct procedures that few would confidently use (or even know about) and provide scant assurance to the board that there is a safety valve in place should all else fail.

These may be simply business-as-usual practices wrapped up as an anti-corruption policy, but the wrapping part of the job is important. It serves, more than anything, as a check that all the angles are covered. All of which should help to avoid the reputational and financial consequences of prosecution under a more robust legal regime.

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