Modern slavery: effective compliance and supply chain management
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On 6th October 2016, the LexisNexis In-house Advisory Board met to discuss supply chain management and how to comply with the Modern Slavery Act 2015. The discussion focused on the role of education and communication across an organisation, and practical tips on how an organisation can assess the risk of modern slavery and be more diligent in on-boarding and working with suppliers.

The session was facilitated by Clive Davies, Senior Counsel at Fujitsu Services, and Colleen Theron, a modern slavery expert and environmental, business and human rights lawyer and consultant.

Key topics discussed and covered in this paper:

- Modern slavery statements
- Assessing risk
- How to work legally with suppliers and hold them to account
- Due diligence
- Who is responsible for compliance?
- Whistleblowing
- Engaging the business.

“Stakeholders want to see solid policies and practices sitting behind the statement”

Introduction

Colleen Theron opened the session with an introduction to the Modern Slavery Act 2015 (“the Act”). Introduced in March 2015, the aim of the legislation is to make businesses accountable in relation to slavery and human trafficking. The Act is seen as forward-thinking and there isn’t a similar obligation for businesses in Europe, however this creates uncertainty for businesses as there are no comparisons or benchmarks to use.

To counter this uncertainty, most companies are taking the beyond compliance approach – going further than just meeting the basic regulatory requirements – when setting out information about what they are going to do to tackle the issue of modern slavery.

One of the areas that is most difficult to manage is the supply chain because of its potential size. Modern slavery affects all of a company’s suppliers. If they have a vast number of suppliers, companies may panic as they simply don’t know where to start. Compliance can be a massive project and, with a lack of resources in a business, it is commonly left to the lawyers to address.

Slavery and human trafficking statements

Section 54 of the Act requires certain organisations to develop a slavery and human trafficking statement each year. Controversially, section 54 wasn’t incorporated into the Companies Act under the reporting section with liability attached. Even though a director has to sign-off on the statement, the obligation has no teeth because there is no personal liability. It is therefore unclear who would be held accountable. In terms of how the legislation develops, it seems likely that NGOs will lobby to introduce criminal liability.

There is concern that slavery and human trafficking statements are likely to just be a gloss of what policies are in place without in-depth risk assessment. There is a lack of understanding about how the modern slavery obligation sits as a bigger commercial piece and the challenge of compliance is to make it real. It isn’t just about producing the statement, it also involves appropriate engagement, training and good reporting. Stakeholders want to see solid policies and practices sitting behind the statement.
“In order to be effective, companies need to treat slavery in the same way they do other areas of compliance”

How do Fujitsu address compliance?

Clive Davies shared his insights with the Board as to how Fujitsu address compliance. At Fujitsu, modern slavery isn’t treated in isolation; it sits alongside bribery and other compliance issues. In order to be effective, companies need to treat slavery in the same way they do other areas of compliance.

The Fujitsu website demonstrates how the company publish their Modern Slavery Statement in a very visible place online. The statement is also linked to the company’s own global business standards, as well as to procurement standards.

As part of Fujitsu’s on-boarding process for suppliers, not only do suppliers sign up to Fujitsu’s terms and conditions but they also have to go through a due diligence exercise, including credit checks. This gives the company a greater ability to manage and control its supply chain.

“Without a mapping process, a company does not know what and where their products are and therefore cannot understand the risk”

Assessing risk

It is important that businesses undertake ‘active compliance’. An example of this is how Fujitsu prepared a global risk analysis to geographically map where the suppliers to their UK business were and to see how those locations ranked in the Global Slavery Index. A mapping process assists a company to know what and where their products are and to understand the associated risk.

At Fujitsu, the mapping process was driven by procurement because of the greater level of risk of modern slavery issues in the supply chain. The map drives where procurement needs to focus its efforts.

Although the same questions should be asked of all suppliers, where there is a supplier from a higher risk area is it essential to be more cautious and aware of the risks. However, it is important to remember that issues are not always in high risk countries – organisations must be aware and be alert at all times.

The Board discussed other approaches to assessing risk. One suggestion was to get the board and key people in the business to map out their products and where they and their suppliers operate. It is often the case that people won’t have realised that they are operating in risk areas.

In order to keep on top of risk, companies also need to have a process for being alerted to supplier changes, for example changes in ownership. Fujitsu often uses framework agreements where all the attention is at the beginning of the contracting stage which can make it harder to pick up compliance issues further down the line.

The Board raised the question of whether companies should revisit agreements at regular intervals to ensure that the relationship with the client is still compliant with modern slavery requirements. Compliance goes beyond simply implementing policies; it needs to involve monitoring and making use of data. Unless the source of products is known, an automated system doesn’t help. There needs to be genuine monitoring and making use of data.

“How much due diligence should you undertake?”

The approach to due diligence that a company takes should always be determined by risk analysis. The biggest question to ask is: what is the impact in litigation costs, time and reputation versus spending some money on training and implementing policies?

Fujitsu based their geographical mapping exercise on the area where they contracted with a supplier. However, this is not necessarily where the work is undertaken or where the headquarters is. This raises the question of how far down the supply chain a company needs to look.

The ideal approach is to go down to the source of the supply. This isn’t always practical for businesses as it requires a lot of resource and there is unlikely to be access to sub-contractors. Companies tend mostly to look at the first tier of their suppliers. It is possible to ask contractors to commit to managing their own suppliers but the ability to audit this is limited. Third parties may not always be reliable and companies may need to undertake audits themselves.

One option is for companies to shorten their supply chain. For example, by opening their own factories and providing the services they can eliminate the middlemen. Another option is for companies to actively tackle the second tier of the supply chain themselves. This requires training tier one suppliers and thus needs considerable time, resource and, most importantly, engaging the buy-in of the suppliers.
Being on the receiving end of due diligence

Companies have to assess suppliers but may also find that they are on the receiving end of contractual clauses and due diligence as a supplier themselves. Clauses and complex questions are starting to become more common and companies therefore need to be completely on top of their modern slavery statement and risk analysis.

The United States has had legislation since 2011 – the California Transparency in Supply Chains Act of 2010 and the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 – but litigation has only recently grown. Nestlé was being sued but they were able to defend themselves by showing their statement and demonstrating that they had genuine policies and procedure behind it. This illustrates how key due diligence is alongside having robust policies.

Who is responsible for modern slavery compliance?

The Board went on to explore where responsibility for modern slavery compliance should sit in the business. Does it sit in Legal because it is to do with legislation or is it a compliance function? Is the best approach a combination of the two?

The issue tends to end up with General Counsel because it requires board approval. Another reason that it tends toward legal is that contracts are now coming through with modern slavery related clauses. The Board’s discussion suggested that who is responsible varies by company. An example was given of a company that pulled together legal, procurement and compliance to work collaboratively, with a third party from within the company to oversee everything.

“...whistleblowing may not be appropriate in the modern slavery context because there is a real fear for the victims”

Managing whistleblowing across the supply chain

Companies have structures for whistleblowing but it still presents challenges. Information on the process isn’t always upfront which can make it difficult for people wanting to access it. Importantly, whistleblowing may not be appropriate in the modern slavery context because there is a real fear for the victims. Some organisations are working closely with NGOs in the area and implementing whistleblowing processes through those NGOs.

There is a problem with the perception of whistleblowing as only being associated with bribery and this needs to be tackled. Addressing perceptions comes down to training and investing resources.

“It needs to be integral to the values of a company in the same way that corporate social responsibility is”

How to engage the business

Creating a successful approach to modern slavery compliance requires the buy-in of the whole business. Crucially, buy-in has to come from the top, however it can be difficult to get this whilst executives see the issue as irrelevant and merely a tick box exercise.

Lawyers tend take a negative approach by stating the financial risk of non-compliance. To engage the business, what is actually needed is an active approach that highlights the positives around how compliance helps both people and the company’s reputation. It needs to be integral to the values of a company in the same way that corporate social responsibility is. Companies need to consider whether they should channel some of their CSR resources towards supporting modern slavery compliance.

There are ‘cosmetic’ steps that can engage the business. The Board gave an example of how one company has set up an ‘Integrity and Ethics’ committee as it sounds far more positive than ‘legal risk’. Changing the culture of a business and its perceptions are a huge challenge. What will not help modern slavery compliance is if it gets the reputation for ‘going over the top’ that health and safety has.

“...there needs to be a much bigger collaboration between businesses, NGOs and the government”

Conclusion

A significant missing piece in the modern slavery compliance puzzle is the current lack of government resources in the area. Whilst there is legislation, the lobbying element is absent. To tackle the issue of modern slavery, the Board agreed that there needs to be much a bigger collaboration between businesses, NGOs and the government.

Sharing knowledge and resources openly across sectors and discussing the challenges and risks is the only way to move compliance forward. Yet, the Board noted, there is an
issue here around not having those kinds of discussions with competitors – compliance is not exempt from this.

In comparison to bribery, modern slavery is a far more emotive issue. No one wants to see that their products have been made by children, for example. An option for the future may be to have a stamp of assurance, in the same way as fair trade products do. However, companies are nervous about this as it requires a high level of robustness to issue such assurance and they do not have full control of their supply chains. Rather than a stamp of assurance, putting a standard such as an ISO in place could be a way for a company for show compliance.

Globally there is a huge challenge and modern slavery has not yet reached a wide state of recognition. It will take a course of cases before it becomes prominent on the radar and gains enough momentum for it to be taken seriously.

Useful websites

www.globalslaveryindex.org

Appendix

A recent survey st an Advisory Board meeting on supply chain management at LexisNexis showed:
Session facilitators

About Clive Davies

Clive is a senior counsel with Fujitsu Services advising on major service contracts with customers especially in the public sector.

Prior to joining Fujitsu in 2007 Clive was the lead IT and outsourcing partner at D J Freeman for 13 years and Olswang for 4 years. He qualified in 1977 and worked as an in-house lawyer for the Alexander Howden Group in the insurance industry, Esso in the petroleum business and ICL in the IT sector before joining D J Freeman in 1990.

Clive specialises in advising on major project contracts for IT outsourcing having represented customers and suppliers in-house and in private practice for many years. He also advises on electronic commerce and data protection.

Clive has been recognised as a leading IT lawyer in the legal directories for some years and lectures and writes regularly on IT related legal subjects. He is chair of the Society for Computers and the Law, the treasurer of the International Federation of Computer Law Associations (IFCLA), an editor of Communications Law and a member of the Intellect contracting best practice working group.

About Colleen Theron

Colleen is a specialist modern slavery expert, environmental, business and human rights lawyer and consultant. Colleen is tri-qualified as a solicitor in England and Wales, Scotland and South Africa. She holds a LLB and Masters in Environmental law from Aberdeen University. She lectures at Birkbeck university.

In 2010, Colleen founded CLT envirolaw with the mandate to harness her niche legal expertise in order to help companies understand how to meet their legal obligations for sustainability and business and human rights and create progressive voluntary best practice standards.

Colleen is passionate about the prevention of human trafficking and was previously a founding director of Finance against Trafficking. She has recently been nominated for an award for her work in raising awareness on modern slavery. She has been recognised in Legal 500 for her expertise in environmental law and is currently an advisory board member for LexisPSL Environment.
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