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Combatting modern slavery and human trafficking

In an interview with Risk & Compliance magazine, FTI Consulting's Nicola Cobb discusses how companies can combat modern slavery effectively.

R&C: In the six years since the Modern Slavery Act was enacted in the UK, have you seen a shift in attitudes toward compliance?

Cobb: In 2015, when the Modern Slavery Act (MSA) came into force in the UK, many companies were hesitant about how much compliance resource to deploy in this space. Given that the MSA did not, and continues not to, attract a financial penalty for non-compliance, bribery and corruption and non-compliance with the Bribery Act in the UK and the US Foreign Corrupt Practices Act (FCPA) were deemed to be a bigger risk, and thus worthy of more management attention.

Over the past few years, however, there has been a proliferation in regulation related to forced labour and human trafficking, including legislation in Canada, Australia, Norway, Germany and across Europe, as well as proposed amendments to the UK legislation. This has sharpened business focus on the human rights of their workforces and has increased demands on businesses to take responsibility, not only for their own actions but also for those of their supply chains.

Heightened societal awareness and growing investor focus on ESG issues and specifically on human rights compliance have increased the pressure on companies to take action. Added to this impetus, there have been several high-profile cases globally which have played out in the press; companies now see the impact of getting it wrong as well as the cost associated with an investigation, the severe reputational damage to brand and board reputation that follows, and the resultant loss of investment.

R&C: What steps can companies take to develop an effective compliance programme when faced with an increasingly complex and evolving network of regulations related to modern slavery?

Cobb: Companies find it challenging to develop a compliance programme given the rapid emergence of new regulations globally. I am often told by companies that there are so many laws and regulations competing for their time that they do not know how to prioritise compliance activities. Effective compliance begins with an assessment, prioritisation and harmonisation of legal obligations as the requirements under each new regulation arise.

At an operational level, irrespective of the specifics of regulation, it is critical for companies to understand who they do business with. The UK MSA covers the entire supply chain and regulates finished products as well as components, which is far-reaching. If one of your suppliers or a contractor is found to have business practices that amount to modern slavery, then your reputation is at risk. The more complex your supply chain, the greater your exposure to modern slavery risk. Essentially, you have a responsibility to your customers to ensure that your supply chain, both direct and indirect, complies with legislation. Questions need to be asked about who your suppliers are, what they do, what raw materials they use, where they carry out their operations and how they function. It sounds easy until you begin unravelling a supply chain for a multinational with diverse interests. Supply chains by their very nature are complex, global, large and ever-changing. Even the most compliant businesses struggle to implement compliance programmes at scale, particularly where market conditions or cultural differences play a role. For example, what is deemed to be unacceptable in France may be a common and agreed working practice in China.

Due diligence is obviously a key aspect of compliance. A question I get asked all the time is how far due diligence should go. The answer is, as far as reasonably practical — but what does that really mean in practice? Where things have gone wrong, in most of the cases I investigate, this has involved suppliers subcontracting without the knowledge of the upstream business. Essentially, the top company does not have sight of a potential bad apple. This has certainly been apparent in high-profile cases that I have investigated in the consumer goods sector. When it comes to accountability, companies also grapple with who to involve and who will 'own' modern slavery. It is essential to have legal, procurement, business operations, compliance and sustainability stakeholders at the table. Without a multi-stakeholder approach, the response to human rights compliance lacks tangible activity or even the right activity.

R&C: Many companies view legislation like the UK MSA as onerous to comply with, but is there a commercial advantage to be gained from compliance?

Cobb: In my experience, compliance gives you the edge commercially — it can be your secret weapon. Civil society and investors are all focused on the importance of environmental, social and governance (ESG), and the 'S', which relates to social or human rights issues is influencing consumer and business behaviour. If you are seen to be operating ethically, your brand and products are valued and you can add a premium.

I have worked with businesses that operate in industries with more than their fair share of scandals when it comes to human rights failings. They have managed to turn a laser focus on sustainability, worker welfare and a sizeable compliance programme into commercial success by doing the right thing, promoting equality throughout the supply chain and importantly being on top of due diligence. The standout success stories relate to those businesses that now have a sizeable market share, attracting the best talent in the market to work for them and importantly, from a commercial standpoint, can attract higher pricing for their products. Sustainability and compliance can pay off — but it needs to become part of the DNA of the business. In turn, where one player in the industry takes a stand, others will follow which, in a sense, indicates that regulation is having the intended effect.

R&C: Due diligence is a huge focus for lawmakers across the world, but is it realistic to expect companies to pinpoint where bad behaviour is happening?

Cobb: Due diligence is a key focus of regulators. It is equally important to have a comprehensive, or end-to-end, compliance programme, including due diligence. As is the case with all compliance programmes, success begins with governance and the right tone from the top cascading down into policies and procedures and ethical business practices with roles and responsibilities assigned across different business functions. Risk assessments are essential to monitor emerging risk as the regulatory and business landscape changes. They become effective tools when mapping your supply chain and help develop a risk-based response programme and prioritise actions geared toward reducing risk.

Due diligence will typically rely on screening tools to assess key risk factors both at the supplier or third-party onboarding stage, looking at adverse media, legal and regulatory sanctions. A robust supplier management programme is not, however, simply due diligence at the onboarding stage — it needs to include a system of audits, ongoing real-time due diligence, key performance indicators and a supplier management programme to escalate problems. And of course, when things go wrong, an investigation is needed to stop non-compliant activity and terminate relationships if necessary, or, even better, create a remediation plan. Due diligence needs to be ongoing, and it needs to be risk-based and pragmatic.

R&C: Looking ahead, how do you expect awareness, compliance and regulation of modern slavery and human trafficking to evolve?

Cobb: The UK MSA requires businesses to publish a modern slavery statement setting out what a company is doing to eliminate slavery both in its own business and in its supply chain. The statement should explain what the business is doing from a governance perspective, how it assesses the risk of modern slavery across the business, due diligence processes, as well as monitoring and measuring success. The requirement is far-reaching, and it is difficult for a company to ensure its entire supply chain is compliant. Equally, the legislation had been criticised for having 'no teeth' as it currently carries no financial penalties for non-compliance and calls for no qualitative review of the statements other than by non-governmental organisations.

On 15 June 2021, the Modern Slavery Amendment Bill was introduced in the UK parliament and proposes several amendments to the MSA designed to increase the obligation on businesses to put a stop to slavery and human trafficking. These include financial penalties — up to 4 percent of global turnover or £20m, whichever is lower — and making it a criminal offence to provide a false modern slavery and human trafficking statement. Similarly, it will be a criminal offence to continue to use supply chains that fail to demonstrate minimum standards of transparency. The amendments also aim to improve standards of transparency in supply chains in relation to modern slavery and human trafficking. The bill is a private bill; it is unknown if it will make into law, but it indicates the regulatory direction of travel.

Recent regulatory developments in the European Union (EU) are also interesting. In March 2021, the European parliament considered and adopted an outline proposal for the 'EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence'. While the directive is not expected to come into force until late 2022 or early 2023, companies falling subject to it will need to start gearing up to ensure they are ready when the new requirements kick in. The directive focuses on due diligence, accountability and corporate governance, and human rights are specifically mentioned. It aims to regulate activity globally.

When it comes to awareness, there has been a marked increase around modern slavery with consumers, wider civil society, investors, employees and shareholders driving for change. As a result, major and often reputable brands face accusations of illegal labour practices, unethical sourcing and human rights abuses in their supply chains, often with a devastating impact on brand and revenues. Even companies that strive to understand and address the risks of modern slavery and unethical conduct, however, struggle to ensure the transparency of complex, global supply chains. Those that have invested in compliance are getting a first-mover advantage. As the focus on ESG is gaining pace, those that embrace ethical business will no doubt reap the benefits.

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