



Ignorance is (not) bliss: SMEs fail to appreciate Bribery Act 2010

A recent survey commissioned by the Ministry of Justice and Department for Business, Innovation and Skills shows a concerning lack of awareness and understanding of the Bribery Act 2010 amongst small and medium sized enterprises. In this briefing, we consider the Ministry's findings, provide a reminder of the offences and set out some practical guidance on adequate procedures to minimise the risk of offending.

On 1 July 2015 the UK Government published a report titled *"Insight into awareness and impact of the Bribery Act 2010 among small and medium sized enterprises (SMEs)"*. The report was a result of a survey commissioned under the auspices of the Business Services Red Tape Challenge, which recommended working with industry to help small businesses fully understand the appropriate application of the Act.

Awareness of the Bribery Act 2010

A full 33% of the SMEs surveyed had neither heard of the Act nor were aware of its corporate liability for failure to prevent bribery (the Section 7 "corporate offence"). Awareness was greater among SMEs exporting to less developed regions, including the Middle East, Asia, Africa and South and Central America (68%) as compared to those companies which exported to developed regions (including Europe, North America and Australia) (58%).

More positively, the large majority (81%) of the SMEs surveyed, which were aware of the Act, were also aware that the Act has extra-territorial reach.

However, of the same group, more than one quarter (28%) perceived that their company did not have sufficient knowledge and understanding to be able to implement adequate anti-bribery procedures.

Awareness of the Ministry of Justice Guidance

Three-quarters (74%) of SMEs aware of the Bribery Act were not aware of the Ministry of Justice's guidance published in March 2011 (the "Guidance"). The Guidance aims to help commercial organisations understand the procedures they can put in place to prevent persons associated with them from committing an offence under the Act.

Anti-Bribery Measures

Only 33% of SMEs had assessed the risk of being asked for bribes, with SMEs exporting to the less developed export regions (36%) and in particular to China (52%) more likely to have assessed this risk.

Approximately four in ten SMEs surveyed (42%) had put bribery prevention procedures in place. Only half of these had written staff policy documents (48%) or raised awareness and provided training (44%) on the topic. SMEs exporting to the less developed regions (45%), particularly China (59%), were more likely to have bribery prevention procedures in place.

The lack of awareness of this topic is concerning. Organisations are unlikely to implement adequate procedures to mitigate the risk of bribery if they are not conscious of the scope of the legislation and the enforcement powers it grants the Serious Fraud Office. The Act is widely viewed as the "best practice" standard for dealing with bribery internationally and the UK Government is keen to ensure that SMEs understand the impact of the Act and conduct business accordingly.

Given the gaps in SME knowledge identified in the report, we set out a brief reminder of the offences below.

The Offences

■ Section 1 – offering or providing bribes

This section defines the "act of bribery" as that of offering/providing an advantage to another person, where the advantage is intended to induce a person to perform a function or activity "improperly" or reward them for that improper performance. It is also an offence to offer an advantage where the offeror knows that its acceptance would itself constitute improper performance.

The improper performance of a function is evaluated according to the view of a "reasonable person in the United Kingdom". If the function is performed abroad, the local customs and practices of bribery are to be disregarded, unless enshrined in the law of that country.

■ Section 2 – receiving bribes

The Act also makes it an offence to be bribed i.e. to request/accept an advantage with the intention that a function or activity will be performed improperly as a consequence, or to accept the advantage as a reward for improper performance. An offence will also be committed where the request or acceptance itself constitutes improper performance.

In relation to this offence, there is no requirement that the recipient of the bribe knows that the connected performance is improper.

■ Section 6 – bribery of a foreign public official

The Act contains a separate specific offence relating to the bribery of public officials. It is an offence to provide an advantage to a foreign public official in order to obtain/retain business or to obtain/retain an advantage in the conduct of business.

Again, the local customs and practices of bribery of public officials are to be disregarded if this action is performed abroad, unless permitted by the law of that country.

■ Section 7 – failure of a commercial organisation to prevent bribery

This is a “corporate” offence which can be committed by any commercial organisation. It is a strict liability offence, meaning that it can be committed by an organisation without intention or knowledge, if a person associated with it (i.e. a person who performs services for it or on its behalf) offers a bribe to obtain/retain business or to obtain/retain an advantage in the conduct of business for the organisation.

Fortunately a defence exists: that the organisation had “adequate procedures” in place to prevent the bribery conduct. What is considered “adequate” will depend on the size of the organisation and the risks faced by it. Companies conducting business in countries with a higher risk profile, for instance, will need to have more stringent practices in place to prevent this economic crime.

■ Penalties

Organisations prosecuted for the Section 7 corporate offence can face unlimited fines. Individuals found guilty of other offences could be sent to prison for up to ten years.

Practical Guidance

What constitute “adequate procedures” will depend on the sort of activity carried out by an organisation and its key characteristics, such as size and management structure. Organisations should therefore avoid looking at compliance as a “tick box exercise”.

The Ministry of Justice has produced Guidance and a Quick Start Guide to assist businesses in determining what sort of procedures they should put in place in order to prevent bribery. These documents can be found here: <https://www.gov.uk/government/publications/bribery-act-2010-guidance>

In addition, readers may find it helpful to refer to Burges Salmon's Self-Assessment Questionnaire and Bribery Act Factsheet. These documents can be used to identify key bribery risk areas and the measures needed to mitigate those risks: http://www.burges-salmon.com/Practices/disputes_and_litigation/Publications/The_Bribery_Act_2010.pdf.

Contact

For further information please contact:



David Hall
Partner

+44 (0) 117 902 2798
david.hall@burges-salmon.com



Thomas Webb
Senior Associate

+44 (0) 117 307 6976
thomas.webb@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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