

Risk of prosecution for SMEs under Bribery Act 2010

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Corporate Crime analysis: Are SMEs doing enough to protect themselves from the threat of prosecution under the Bribery Act 2010 (BA 2010)? Hickman and Rose partner Andrew Katzen and paralegal Tom Bushnell explore the recent government survey into the awareness and impact of BA 2010 among SMEs in the UK.

Original news

Survey reveals SME awareness of Bribery Act 2010, LNB News 02/07/2015 135

BA 2010 is not having any widespread negative impact on the export activity of SMEs, a Ministry of Justice and Department for Business, Innovation and Skills survey has revealed. Two-thirds of the SMEs which responded had either heard of BA 2010 or were aware of its corporate liability. However, only a third had assessed the risk of being asked for bribes, and around four in ten said they had put bribery prevention procedures in place. The survey sought the views of 500 SMEs, 95% of which export goods.

What does the report tell us about how seriously businesses are taking BA 2010?

The government has described the results of this report as 'encouraging'. However, when one reads more closely, the news is mixed.

66% of the SMEs surveyed had heard of BA 2010 or were aware of the criminal liability it creates for corporates which fail to prevent bribery. This sounds low, but it is of some comfort (if not overly surprising) that awareness was greater among SMEs exporting to less economically developed regions, where the risk of bribery and corruption tends to be greater than in more developed regions. Similarly, 81% of those who had heard of BA 2010 were also aware of its extra-territorial reach, perhaps one of the most important aspects of BA 2010.

The more concerning news was that of those aware of BA 2010, only 72% felt that their company had sufficient knowledge and understanding to implement adequate anti-bribery procedures. This may partly explain why only 42% of the SMEs surveyed had bribery prevention procedures in place (defined as anything that they thought helped prevent bribery). Given the serious consequences of a failure to comply with BA 2010 and the defence that adequate procedures afford (BA 2010, s 7(2)), these may be the findings of greatest concern.

Finally, the report found that 89% of those surveyed felt that BA 2010 had no impact at all on their ability or plans to export. Going forward, this may be the most reassuring statistic in the report. However, one might question how readily any company would admit to being hindered by anti-bribery law, particularly to market researchers hired by the government. Moreover, the report seems to focus much of its attention on SMEs working in imports and exports, apparently proceeding on the assumption that bribery is something that only occurs abroad. SMEs (and readers of this report) must not be complacent, and remember that BA 2010 is just as applicable within the UK.

Why should SMEs take action to comply with BA 2010?

Putting aside the morality of winning business by corruption, the consequences for any corporate entity and its employees if found to have acted in breach of BA 2010 are very serious. Individuals face up to ten years imprisonment and/or an unlimited fine. A corporate entity faces an unlimited fine and, presumably, considerable reputational damage.

Furthermore, the effect of the Proceeds of Crime Act 2002 (POCA 2002) in these cases should not be underestimated. A conviction under BA 2010 would trigger confiscation powers under POCA 2002, Pt II. POCA 2002's draconian powers could leave an SME paying back very large sums of money connected with the unlawful conduct, especially if the statutory assumptions regarding extended benefit apply.

What are the most important steps businesses should take to comply with BA 2010?

'Adequate procedures' to prevent bribery are of central importance, creating a defence to criminal liability for a corporate entity that might otherwise be liable for its failure to prevent bribery (BA 2010, s 7). These procedures must be proportionate to factors such as:

- o the level of bribery risk
- o the size of a company, and
- o its business model

Not only do the procedures need to be in place, but they will evidently need to be properly applied. Any authority investigating potential bribery will want to see that information about procedures has been disseminated to employees, and that the procedures themselves have been rigorously applied, stress tested and routinely reviewed.

As this report's foreword reminds us, the government and financial authorities remain keen to emphasise that this isn't just a 'tick box' exercise aimed at preventing liability. The expectation instead is that the procedures create a 'bribery prevention dynamic' (whatever that means) throughout a corporate entity.

What are the current key issues in anti-bribery which practitioners should be aware of?

Practitioners working in this area are yet to face the kind of difficult tangle of appellate decisions that existed under the old law. However, it remains a developing area. The Serious Fraud Office's (SFO) joint head of bribery and corruption announced in May 2015 that the first deferred prosecution agreement 'invitation letters' had been sent. Press commentators are starting to consider whether BA 2010 will make future prosecutions for the paying of public officials easier. And it was a bribery investigation that set the scene in February 2015 for an important Administrative Court decision on legal advice in Criminal Justice Act 1987, s 2 interviews (see *R (on the application of AFP Lord & Ors) v Director Of The Serious Fraud Office* [2015] EWHC 865 (Admin))--an area where the SFO is increasingly flexing its muscles.

Finally, at the end of 2014, an Eastbourne-based printing firm called Smith and Ouzman Ltd and two employees were all convicted of offences under the old Prevention of Corruption Act 1906. In addition, we are aware of at least one ongoing SFO investigation into alleged bribery at a UK SME. So while major probes into the likes of Rolls Royce and GSK may grab the headlines, SMEs should be aware that the risk they face under anti-bribery legislation is very real.

Andrew Katzen leads the regulatory team at Hickman and Rose. Andrew acts for a wide range of corporate and individual clients facing regulatory investigation or prosecution. He is a co-author for Butterworth's Fraud: Law Practice and Procedure.

Interviewed by Barbara Bergin.

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