

Legal Update

Eyes wide open: how SMEs should manage new bribery and corruption risks in light of “gamechanger” UK Government support

On 5 June 2019, the then Secretary for State for International Trade (**SoS**), Dr Liam Fox, announced a new government initiative to help provide finance to UK small to medium sized businesses (**SMEs**) for exports to emerging markets. While SME exporters may welcome this show of financial support at a time of Brexit uncertainty, they could also be exposed to new and emerging bribery and corruption risks should they engage in increased or new business in emerging markets. This article considers the risks SME exporters may face, how SMEs can address these challenges and the role UK Government and large multinationals can play in supporting SME exporters in navigating these challenges.

Government support reinforces the integral role of SMEs in the UK economy

SMEs represent the vast majority of UK businesses and account for a majority of private sector employment in the UK. According to the Department of Business, Energy and Industrial Strategy, SMEs accounted for 99.9% of companies and 60% of private sector employment in the UK at the start of 2018.¹ Indeed, the combined annual turnover of UK SMEs in 2018 was £2 trillion or 52% of all private sector turnover.

The UK Government estimates that 400,000 SMEs in the UK have the capability to export, but currently do not. As the SoS put it, “*these announcements are potential gamechangers for our export industry, and will help us to tap a fresh vein of potential from within our economy.*”² Throughout the course of 2018, 5% of non-exporting SMEs expressed a willingness to export goods from the UK – this could potentially amount to around 20,000 new SME exporters. This “gamechanger” financial support may incentivise a larger proportion of those SMEs to start exporting goods.

The UK Government’s financing package will support SME exporters in their exports from the UK to fast-growing emerging markets. It will give SME exporters greater access to bonds and working capital. The package itself includes three core elements:

1. The Small Deal Initiative, under which UK Export Finance (**UKEF**) will guarantee the loans of potential overseas buyers of British goods to make UK bids more competitive;
2. An extension of financial support to exporters and their supply chains; and
3. The General Export Facility, which will allow UKEF to support exporters’ overall working capital requirements rather than linking support to specific export contracts.

¹ Business Population estimates for the UK and regions 2018, published 11 October 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746599/OFFICIAL_SENSITIVE_-_BPE_2018_-_statistical_release_FINAL_FINAL.pdf

² Liam Fox announces ‘gamechanger’ financial support package for UK SME exporters, UK Government Press Release, 5 June 2019, available at: <https://www.gov.uk/government/news/liam-fox-announces-gamechanger-financial-support-package-for-uk-sme-exporters>

Post-Brexit opportunities present post-Brexit risks

“The impact of bribery [and] corruption is devastating for the economy and more so for SME[s]. Most SME[s] are very small and more exposed to these practices.”³

Since the Brexit referendum, warning shots have been fired from different quarters cautioning that UK firms will face greater corruption risks post-Brexit. In 2018, the National Crime Agency (NCA) stated that *“UK-based businesses may look to increase the amount of trade they have with non-EU countries... [which] will increase the likelihood that [they] will come into contact with corrupt markets, particularly in the developing world, raising the risk they will be drawn into corrupt practices.”⁴*

Furthermore, a 2018 report published by Transparency International UK (**TI-UK**) concluded that six out of the UK’s top ten trade partners are *“not adequately punishing companies that pay bribes overseas”* and recommended that the UK ensures anti-corruption and transparency provisions are built into all of the UK’s post-Brexit trade deals.⁵ When the UK fell out of the top ten of Transparency International’s Corruption Perceptions Index in May 2018 for the first time since the UK hosted its Anti-Corruption Summit in 2016, Robert Barrington, outgoing Executive Director of TI-UK, noted that this *“will serve as an important warning to the UK against complacency in tackling corruption, not least with the prospect of post-Brexit pressure to lower standards.”⁶*

3 Combating bribery in the SME sector, Association of Chartered Certified Accountants, November 2013, available at: <https://www.accaglobal.com/ab44>

4 National Strategic Assessment of Serious and Organised Crime 2018, National Crime Agency, available at: <https://nationalcrimeagency.gov.uk/who-we-are/publications/173-national-strategic-assessment-of-serious-and-organised-crime-2018/file>

5 UK’s global partners failing to punish corporate bribery, Transparency International Press Release, 12 September 2018, available at: <https://www.transparency.org.uk/press-releases/uks-global-partners-failing-to-punish-corporate-bribery/>

6 K drops out of top 10 in global anti-corruption rankings, the Financial Times, 29 January 2019, available at: <https://www.ft.com/content/8d1a2474-224e-11e9-b329-c7e6ceb5ffdf>

In short, the risks presented by trade with higher risk markets affect all UK exporters, large and small. However, where large multinationals are more likely to have extensive policies and procedures, training programmes and resources in place to manage and mitigate bribery and corruption risk, SMEs may not be so well-equipped to appropriately manage the risks posed by new and emerging markets.

What are the risks?

“Bribery and corruption stifles growth of SMEs as income or profits are wiped through kickbacks given in order to secure contracts.”⁷

This financing package provides incentives for current SME exporters to increase exports both to existing and new markets. It also provides incentives for the 400,000 SMEs that have the potential to export to start exporting – not just to the relatively safe havens of the UK’s European and North American counterparts, but all around the globe. As the SoS stated, *“if we want to become an exporting superpower, with greater influence, selling more goods and services abroad and encouraging more British investment overseas, then we will have to invest in the capabilities required.”*

The package is a clear statement of intent not just to support UK SME exporters but also to encourage them to prosper in the impending post-Brexit world. However, new SME exporter activity with fast-growing emerging markets presents new risks – including bribery and corruption risks – both to those SME exporters and to the UK economy on a wider scale.

First, SMEs are unlikely to have the same level of sophistication as large multinationals as regards risk management and the engagement of third parties. On the one hand, a multinational may have compliance teams and in-house lawyers dedicated to conducting risk assessments, designing third

7 Combating bribery in the SME sector, Association of Chartered Certified Accountants, November 2013, available at: <https://www.accaglobal.com/ab44>

party engagement policies and procedures and advising on third party engagement. On the other hand, an SME might not even have one employee dedicated to mitigating compliance and regulatory risks. SMEs that are considering exporting to new markets should conduct a risk assessment, assess the adequacy and effectiveness of their policies and procedures and take appropriate steps to mitigate bribery and corruption risks. Senior management buy-in and appropriate resourcing of qualified individuals is absolutely key.

Second, SMEs may turn to third parties (e.g. agents or intermediaries) to support their activities in emerging markets, which would in turn present increased bribery and corruption risk to such SMEs. A balance must be struck between the assessment of the risk presented by such third parties and the cost of mitigating those risks. For example, it may not be proportionate to require a small port consultant in an emerging market to provide a report on every interaction it has with a government official. However, the potential risks must be properly assessed and documented, and proportionate steps must be taken to mitigate those risks.

Third, SMEs may lack in-house expertise to identify red flags and proactively manage third party risk. Increased (and new) exports may expose SMEs to new, higher risk scenarios: for example, an SME exporter may face uncooperative customs officials in ports or local “fixer” agents who can arrange for the release of goods from ports for a fee. SMEs should properly assess the bribery and corruption risks of entering a new export market and put in place measures to mitigate those risks, as appropriate.

Fourth, SMEs may lack the expertise and resource to thoroughly investigate any concerns that arise, for example a whistleblowing report of an agent paying a bribe in a new market for the benefit of the SME’s business. SMEs should ensure that contracts with third parties provide appropriate contractual protections (e.g. termination rights in the event an associated person pays a bribe on behalf of that SME) and that identified concerns are properly investigated – with external support, if necessary.

SMEs should be more alive to existing guidance

“Clear guidelines should be given to SMEs to help them understand the impact of bribery and corruption.”⁸

Education of SMEs around existing guidance concerning bribery and corruption risks is of fundamental importance, particularly in respect of SME exporters who engage with emerging markets. In March 2019, the House of Lords Independent Review into the UK Bribery Act 2010 (**the Review**) stated that SMEs, especially those exporting to new markets for the first time, “need more assistance in formulating their anti-bribery and corruption policies”.⁹ In fact, one of the Review’s conclusions was that the Government should take steps to better inform SMEs of the existence of the Ministry of Justice Guidance on the UK Bribery Act 2010 (**UKBA**).

Why is this important? On the one hand, there is a need for SMEs to better understand their legal obligations in this area. The UK Anti-Corruption Forum has stated that “many SMEs are neither aware of the legislation nor the guidance, and are thus putting themselves at risk of criminal prosecution” and that “[SMEs] operating overseas are likely to have less gravitas or force when attempting to rebuff requests for bribes by corruption officials than large, multi-national organisations.”¹⁰ On the other hand, SMEs, their directors and their employees face the risk of regulatory sanctions if they fall foul of anti-corruption legislation. For example, in March 2018, Skansen Interiors, a company with only 30 employees, was prosecuted for failing to have in place adequate procedures to prevent persons associated with it from committing offences under

⁸ Combating bribery in the SME sector, Association of Chartered Certified Accountants, November 2013, available at: <https://www.accaglobal.com/ab44>

⁹ The Bribery Act 2010: post-legislative scrutiny, House of Lords Select Committee, published 14 March 2019, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf>

¹⁰ Written evidence from: the UK Anti-Corruption Forum (BRI0009) to the House of Lords Select Committee, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/written/87146.html>

the UK Bribery Act 2010.¹¹ More recently, on 27 June 2019, Carole Ann Hodson, the former owner and director of ALCA Fasteners Ltd (an SME), was sentenced to two years in prison and ordered to pay penalties and costs in excess of £5 million in connection with a bribery scheme pursuant to which ALCA Fasteners improperly secured contracts worth £12 million.¹² Miss Hodson was also disqualified from acting as a company director for seven years.

Practical tips for SME exporters

So what are the potential solutions for SMEs? In order to engage with higher risk jurisdictions, SME exporters should consider the following:

1. Conduct a risk assessment: An SME must first assess and document the bribery and corruption risks it faces in its operations. Proper risk assessment is a key preventative step to help mitigate bribery and corruption risks before they materialise. If an SME exporter is considering embracing the UK Government's support, this would be a timely opportunity to review and enhance the SME's existing risk management programme.

2. Take heed of existing guidance: SMEs should look to existing guidance to inform its approach towards mitigating bribery and corruption risk. The Ministry of Justice guidance published in March 2011 sets out six core guiding principles to support companies in managing these risks (proportionate procedures, top-level commitment, risk assessment, due diligence, communication and monitoring and review).¹³ In December 2013, Transparency International published its updated Business Principles for Countering bribery in December 2013¹⁴ and, in 2012, the International Chamber of Commerce published model anti-corruption contractual clauses with associated guidance. While there is limited specific guidance

for SMEs, the International Chamber of Commerce has issued a guide titled Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises¹⁵ and Transparency International published its Business Principles for Countering Bribery for SMEs in 2008.¹⁶ It remains to be seen whether the UK Government will take heed of the calls for more guidance specifically for SMEs following the Review, however, there is extensive guidance of general application that should help guide SMEs nonetheless.

3. Consider applying for support from the UK Government's Business Integrity Consultancy Service:

The UK Government has established a business integrity initiative through which SMEs can apply for up to five days of match-funded, tailored guidance from a consultant on bribery and corruption and human rights risk mitigation.¹⁷ The programme is subsidised by the Department for International Development and is subject to certain eligibility requirements. This new initiative could provide SMEs much needed support in developing their own anti-corruption compliance programmes to mitigate bribery and corruption risk.

4. Take the lead from multinationals: Large multinational organisations that conduct business in emerging markets are likely to have more developed policies and procedures in place to mitigate bribery and corruption risks compared with SMEs. SMEs could look to larger companies operating in similar sectors and regions to see how those companies look to mitigate such risks. Indeed, multinationals are increasingly open to providing support to SMEs in these areas based on their own experiences. There may also be sector-specific collective action initiatives that provide forums for learning about industry best practice.

¹¹ CPS secures first conviction for failure to prevent bribery, The Law Gazette, 9 March 2018, available at: <https://www.lawgazette.co.uk/law/cps-secures-first-conviction-for-failure-to-prevent-bribery/5065201.article>

¹² ALCA Fasteners Ltd, SFO Press Release, 27 June 2019, available at: <https://www.sfo.gov.uk/cases/alca-fasteners-ltd/>

¹³ The Bribery Act 2010 – Ministry of Justice Guidance, Ministry of Justice, March 2011, available at: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

¹⁴ Business principles for countering bribery, Transparency International, 17 December 2013, available at: https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery

¹⁵ ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises, 26 May 2015, available at: <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>

¹⁶ Business principles for countering bribery – SME edition, Transparency International UK, 31 May 2008, available at: https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery_small_and_medium_enterprise_sme

¹⁷ The Business Integrity Consultancy Service, Department for International Trade, 17 July 2019, available at: <https://www.great.gov.uk/advice/manage-legal-and-ethical-compliance/helping-companies-do-business-with-integrity/>

5. Educate management and staff. Education of all staff through training and workshops is key to helping management and staff understand and identify bribery and corruption risks. Free online tools, such as Transparency International's e-learning on doing business without bribery, could be a good starting point.¹⁸ If bribery and corruption concerns are identified by staff, it is also important that they are investigated and managed appropriately. In 2015, a survey of SME awareness of the UKBA commissioned by HM Government indicated that only 66% of SMEs surveyed had either heard of the UKBA or were aware of the corporate liability for failure to prevent bribery.¹⁹ There is still a long way to go to educate management and staff on bribery and corruption risks across SMEs.

The value of ethical business practices

"Avoiding bribery and corruption could lead to long-term shareholder value and improve business goodwill."²⁰

Transparency International has repeatedly called upon the UK Government to incorporate anti-corruption standards into its post-Brexit trade deals. In July 2018, Robert Barrington stated that: *"The UK has an opportunity to provide...leadership by building robust anti-corruption provisions into new trade agreements, in particular with those*

*states...that have little to no enforcement against bribery."*²¹ Duncan Hames, current acting Executive Director at TI-UK, also stated in 2017 that *"trade deals that will follow Brexit offer a great opportunity for the UK to commit to transparency and preventing bribery."*²²

The post-Brexit business outlook will undoubtedly present new challenges to SMEs. The UK Government's financial package provides welcome support to SMEs. While the details of any post-Brexit trade deals are still being negotiated (and may not emerge for some time), SMEs might consider adopting ISO standards or seeking guidance from industry associations to support their business activities with emerging markets. If an SME is able to take the steps set out above, it will be in a better position both to manage and mitigate bribery and corruption risks and to set an example of how to conduct business ethically in its international operations to its shareholders, its suppliers and its counterparties alike. That is the real opportunity.

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¹⁸ Doing business without bribery – e-learning tool, Transparency International UK, available at: <http://www.doingbusinesswithoutbribery.com/>

¹⁹ Impact of the Bribery Act 2010 on SMEs, Ministry of Justice and Department for Business, Innovation & Skills, 1 July 2015, available at: <https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes>

²⁰ Combating bribery in the SME sector, Association of Chartered Certified Accountants, November 2013, available at: <https://www.accaglobal.com/ab44>

²¹ Post-Brexit, strong anti-bribery legislation more important than ever, Transparency International Press Release, 17 July 2018, available at: <https://www.transparency.org.uk/press-releases/post-brexit-anti-bribery-important/>

²² Build anti-corruption measures into all post-Brexit trade deals, Transparency International Press Release, 11 May 2017, available at: <https://www.transparency.org.uk/press-releases/ge-2017-manifesto/>