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The Modern Slavery Act 2015: What does it mean for business?



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Introduction

The private equity industry has arguably been at the forefront of the Environmental, Social and Governance (“ESG”) debate. By incorporating these non-financial performance indicators into investment decisions and portfolio management, financial and reputational risks should be better managed and potential opportunities hopefully identified. In particular, controlling exposure to, or association with, human rights violations is becoming increasingly important for investor relations and brand management.

Following a flurry of recent UK and EU laws requiring increased corporate reporting and transparency, the UK Government has taken the progressive step of passing the Modern Slavery Act 2015 (“MSA”), which in addition to enshrining a range of criminal offences also includes a new corporate reporting obligation.

Before outlining the key elements of the MSA which specifically target industry, it is worth reflecting on the impact of corporate transparency obligations. Although seen by some as soft legislation, in that businesses are simply required to disclose information, the impact of such transparency on corporate behaviour can be profound. To publically admit or imply that your organisation does not consider, manage or seek to improve human rights or other ESG issues could significantly tarnish a consumer brand, limit (or even bar) funding opportunities and open the door to NGO, shareholder and investor activism.

The power of ‘private regulatory governance’ - the notion that businesses are increasingly governed as much by consumer and industry opinion and choice, as by traditional regulatory restrictions and controls - is becoming increasingly evident. Companies exposed to these new forces are increasingly acknowledging that customers and investors are in effect the new regulators, arguably holding greater power than traditional agencies and authorities.

The Modern Slavery Act 2015 (MSA)

The MSA received Royal Assent on 26 March 2015. The MSA restates and updates a range of criminal offences covering the practices of forced or compulsory labour, human trafficking and other forms of exploitation. In addition, the MSA includes a requirement for commercial organisations over a certain size to disclose, at the end of each financial year, the steps it has taken to ensure that slavery and human trafficking is not taking place within its business. Of note, associated supply chains will also need to be considered.

The MSA is ‘framework legislation’, meaning that further legislation will need to be enacted to fully implement a number of the new obligations. That said, although we still await these daughter regulations, the policy objectives are clear and we have a good idea of where the UK Government is heading.

Relevance to Private Equity

Commercial organisations, be it either a body corporate or partnership carrying out business in any part of the UK, which (a) supply goods or services and (b) meet a (to be set) total turnover threshold, will be caught by the MSA’s new corporate reporting obligation.

The UK Government has clearly stated that this reporting obligation is intended to apply to commercial organisations (corporate bodies and partnerships, wherever incorporated or formed) which carry on a business or part of a business, in any sector, in the UK and who have a turnover above a certain minimum amount. The MSA is therefore not limited to only UK incorporated or registered entities.

Although the potentially wider term of 'carrying on business' is not defined in the current framework legislation, it is likely that this test will be as under the UK's Bribery Act. It is anticipated, however, that there will need to be a demonstrable business presence in the UK, for example, merely being listed on a UK market may not in itself be considered as 'carrying on business'.

Until the draft daughter regulations delineating the turnover thresholds are released (which is anticipated later this year), we cannot say for sure where the line will be drawn (nor, as has been indicated if there will be a corporate group aggregation). From the current consultation document, it is clear, however, that this legislation is intended to capture 'large businesses' only. That said, the range of potential annual turnover thresholds cited in the latest consultation is unhelpfully broad: £36m to £1bn.

If caught, what do organisations need to do?

If required to participate, commercial organisations will, at the end of each financial year, need to produce a board of directors approved statement outlining either (i) steps it has taken to ensure that none of the prohibited actions and practices outlined in the MSA are present (both inside the organisation and in associated supply chains) or (ii) publically admit that no steps have been taken to manage this risk. The statement, which should follow the requirements set out in the MSA, must then be sent to the newly appointed Independent Anti-Slavery Commissioner and published on the organisation's website in a "*prominent place on the website's homepage*".

Declaring that 'no steps have been taken', is for all the obvious reasons unlikely to be a realistic or sensible option for most organisations. The UK Government states, and our experience bears this out, that "*commercial competition will make doing nothing an unattractive and potentially more expensive option*".

Failing to make the mandatory declaration (whether a positive or negative one), can lead to enforcement in the form of an injunction or related action.

Next steps

Given the current focus on ESG and related risks, it will be important for the private equity industry to monitor the precise requirements of this new regime as the subordinate legislation is passed later this year.

Effective management of human rights obligations throughout portfolio companies and their supply chains, ideally in line with the principles laid down by the UN and OECD, is undoubtedly a challenge. Ensuring such policies and procedures are packaged, implemented and communicated in a legally robust and defensible manner is proving to be equally daunting.

As legislation catches-up with public opinion, it will become increasingly difficult for organisations to sit on the side-lines or try to dismiss the current scrutiny on compliance and risk as a passing fad. Understanding your obligations as well as the wider risk context is the crucial first step in taking proportionate action to protect your organisation.