

The impact of the UK Bribery Act 2010 on European multi-nationals

European companies that implement an effective anti-corruption/bribery compliance program demonstrating a strong “tone at the top” that includes effective training, detection and monitoring capabilities are able to more closely avoid risks, harmful transactions or relationships, which ultimately serves to enhance reputation and reduce exposure to fines and loss of government business resulting from the violation of bribery laws, like the UK Bribery Act.

A recent development in the regulatory anti-corruption environment is the enactment on 8 April 2010 of the Bribery Act 2010 in the United Kingdom. Although it is UK legislation, the Bribery Act may have serious implications for European companies. The Bribery Act replaces previous offences with a general bribery offence and a specific offence relating to the bribery of foreign public officials (both of which are applicable to individuals and UK-incorporated companies). It also introduces a specific corporate offence of failing to prevent bribery.

Of particular note is that companies incorporated elsewhere and carrying on “a business, or part of a business” in the UK can be found guilty of the offence of failure to prevent bribery in the absence of what is referred to in the Act as “adequate procedures”. This offence is designed to make companies responsible for bribery committed on their behalf by amongst others, its employees, agents or subsidiaries. This is a familiar concept also found in the US Foreign Corrupt Practices Act. A defence is available if it can be shown by the company that “adequate procedures” designed to prevent bribery were in place. These procedures will therefore need to be evidenced.

Companies found guilty of these bribery offences could face unlimited fines. In addition, they may be debarred from tendering for UK government contracts.

The intention behind the creation of the new offence of failure to prevent bribery is evident from statements made by Richard Alderman, Director of the UK Serious Fraud Office (SFO) in recent speeches¹ - “This creates a level playing field and ensures that ethical corporates in the UK will not be disadvantaged by the activities of those elsewhere who seek to derive a competitive advantage through corruption.”

He encouraged corporates, advisors, non-governmental organisations and others to provide the SFO with information and evidence that can be used to attack bribery resulting in ethical UK corporates being undercut. He stated that the SFO “share a common objective in making sure that those who use illegal or unethical practices to obtain a competitive advantage over ethical corporates do not flourish and that we put them out of business”.

Mr Alderman went on to send a warning to senior executives in companies by saying: “I want people in corporates to know that if they become involved in bribery they can be investigated and prosecuted whether in the UK or another jurisdiction and that it is not just a corporate or regulatory issue. We have to get through to senior people in corporates for example that this matters to them personally and that they themselves could end up by standing in front of a judge and jury or being extradited to another jurisdiction.”

1. The 4th ICAC Symposium held on 15 December 2009 and the Corporate Investigations Group Seminar held on 12 February 2010

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There are a number of areas of the Act, particularly around the offence of “failure to prevent” bribery, where the exact interpretation and application will need to be determined by reference to case law or further guidance. Notwithstanding these uncertainties, one can with reasonable certainty predict that multi-national companies with extensive operations in the UK will likely be subject to this law.

With respect to guidance on what constitutes “adequate procedures” to prevent bribery, the Act stipulates that the UK Secretary of State must publish guidance about procedures that companies can put in place to prevent bribery. This guidance has not been published yet, but in the meantime some insight is available in the form of a communication issued by the SFO titled “Approach of the Serious Fraud Office to dealing with overseas corruption”.

The SFO communication provides companies with insight, at a high level, of the expectation of the regulators, but falls short of providing practical steps organisations can take to achieve this. It indicates that the SFO will be “looking to find evidence of adequate procedures to assess how successful the corporate has been in mitigating risk” and the SFO will “also be looking closely at the culture within the corporate to see how well the processes really reflect what is happening in the corporate.” The communication includes the following points for consideration:

- Clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate
- Code of Ethics
- Principles applicable regardless of local laws or culture
- Individual accountability

- Policy on:
 - Gifts and hospitality and facilitation payments
 - Outside advisers/third parties including vetting and due diligence and appropriate risk assessments
 - Political contributions and lobbying activities
- Training to ensure dissemination of the anti-corruption culture to all staff at all levels
- Regular checks and auditing in a proportionate manner
- Helpline which enables employees to report concerns
- Commitment to making it explicit that the anti-bribery code applies to business partners
- Appropriate and consistent disciplinary processes
- Effect of any remedial action taken where previous cases of corruption occurred

The SFO communication points out the benefit of self reporting by companies of overseas corruption, which could lead to a negotiated settlement rather than criminal prosecution and mandatory debarment.

With the regulatory risk posed by the Act for companies incorporated elsewhere and carrying on “a business, or part of a business” in the UK, it is important for companies to take action now. Corporate anti-bribery measures take time to design, implement and become sustainable. There is no simple “tick-box” approach to this area, rather a set of measures tailored to mitigate the specific risks faced by a company, which need to be in place and effective in order to prove the adequacy of procedures.

To have a deeper conversation about how this subject may affect your business, please contact:

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