

Anti-Bribery Legislations: A Business Barrier?

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Overview

The enactment of Anti-Bribery legislations had impacted how a corporation can do business around the globe. Some of those legislations, namely Foreign Corrupt Practices Act 1977 (FCPA) and UK Bribery Act 2010, are long-arm statutes, which means that the government can enforce the law against a party that violates such law outside of the jurisdiction¹. Due to such “long-arm” of the law, it should be carefully observed and complied by the parties governed by such laws around the globe.

The FCPA

Pursuant to the FCPA, it is “unlawful for any issuer, domestic concern, or person acting within the United States to offer or make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party, or party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business”².

The enforcement agency of the FCPA is the Department of Justice, and below are the list of largest sanctions given pursuant to the FCPA:

¹ "Long-Arm Statutes: A Fifty-State Survey". VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.. 2003. Retrieved 2012-04-20.

² 15 U.S.C. § 78dd-1, *et seq*

Top 11 Corporate FCPA Settlements		
No.	Corporation (HQ; Year)	Total US Settlement Amount
1	Siemens (Germany; 2008)	\$800M
2	KBR/Halliburton (US; 2009)	\$579M
3	BAE Systems (UK; 2010)	\$400M
4	Snamprogetti/ENI (Holland/Italy; 2010)	\$365M
5	Technip (France; 2010)	\$338M
6	JGC (Japan; 2011)	\$219M
7	Daimler (Germany; 2010)	\$185M
8	Alcatel-Lucent (2010)	\$137M
9	Magyar Telekom/Deutsche Telekom (Hungary/Germany; 2011)	\$95M
10	Panalpina (Switzerland; 2010)	\$82M
11	Johnson & Johnson (US; 2011)	\$70M

The UK Bribery Act

The UK Bribery Act 2010 introduces 2 offense categories, which are “bribing” and “being bribed”. Particularly related with organizations, an offense of “failing to prevent bribe” is also available. This Act had been prosecuted an offender on November 2011, which is only months after its enactment, and the first person prosecuted was Munir Patel³. The enforcing agency of the UK Bribery Act is the Serious Fraud Office (SFO).

The UK Bribery Act applies to UK citizens and UK companies for any acts which take place in the UK as well as the acts carried out anywhere in the world, and is named as the toughest anti-corruption legislation in the world⁴ due to its strict provisions.

Compliance Issues

Due to the fore mentioned long-arm statutes, US and UK based companies operating in developing countries have to fully comply with the anti bribery legislations, and failure to do so will be subject to prosecution. However, a number of developing countries have high risk of corrupt practices, to the extent that at certain states, it is almost impossible to run a business without making an “under-table” payment, or in the worst case obtain a single

³ Eoin O’Shea (28 November 2011). "Opinion: First conviction proves Bribery Act has sharp teeth"

⁴ Breslin (2010) p.362

business license. The FCPA, however, is much more flexible since it permitted facilitation payment or “grease money”⁵.

One of the examples of the developing country is Indonesia. Despite of the fact that the companies have to comply with the anti-bribery legislations, they in turn will not be able to perform their business in Indonesia since most public officials will demand payment for obtaining the general corporate licenses, domicile letter, business permit, and all other documents. And if the company chose to fulfill the request of the officials, they have the risk of facing prosecution in the country of their origin.

The above issue is the most major concern related with the enactment of the anti-bribery legislations which is a long-arm statute. The purpose of such legislations in combating corruption are good, however, it may hinder the development of the corporations by impacting its competitive edge⁶. Those corporations will lost its business in Indonesia, and other companies originating from a country that does not have those kinds of anti-bribery legislations can do their business in all ways possible, thus eliminating competition. At the end of the day, the only viable solution for companies governed by the anti-bribery legislation is to revoke their investment in developing countries due to their un-favorable position.

Compliance - Moving Ahead

In order to overcome the compliance issue stated above, it is imperative for the anti-bribery legislations to have a more flexible provision. Also consideration on how and where the violation takes place is also crucial, for instance, by considering the laws of the country where the corporation operates, as well as the customary of the country. By implementing these approaches in the legislation, the corporations will not lose its competitive edge, while at the same time, corruption prevention can be performed.

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⁵ Stuart H. Deming (2005) The Foreign Corrupt Practices Act And the New International Norms", American Bar Association, ISBN 1-59031-326-7 p.15

⁶ Simon Clarke, “UK Bribery Act” [2010]