

EDITORIAL

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DISMISSING THE UK BRIBERY ACT COULD SPELL DANGER FOR SA COMPANIES

Whilst the UK Bribery Act 2010 ('the Act') came into effect in July 2011 in the UK and repeals all other anti-bribery legislation in the UK, there are numerous implications the Act may have upon South African companies and its impacts could be felt far and wide, says Terry Booyesen, CEO of CGF Research Institute (Pty) Ltd.

The Act has proved to be one of the most robust pieces of bribery legislation created in the world to combat bribery and corruption in government and businesses, and experts now believe the Act expands upon many of the provisions originally set by the US Foreign Corrupt Practices Act of 1977. It amends and reforms the UK common law as well as their criminal law vis-à-vis bribery. Commenting further, a director of Werksmans, David Loxton says the Act provides a modern legal framework to combat bribery in the UK, including those parties affected by this Act outside the UK. "Through its application, it also seeks to alleviate some of the effects bribery has upon the poverty trap found in developing countries. Although the UK Serious Fraud Office (SFO) is yet to take enforcement action under the UK Bribery Act, the new director of the SFO -- David Green CB QC -- stated he will not sacrifice solid prosecutorial demands for easy headlines," continues Loxton. David Green has made it clear that the SFO's energies will be focussed on only the most important cases that undermine the confidence in the UK and the city of London, and those that undermine a level playing field.

"Whilst the Act is in itself a foreign piece of legislation to South Africa, the extra-territorial provisions of the Act could have a serious impact on the manner in which South African companies conduct themselves in the UK, and vice versa. It is unlikely that we will have early answers on some of the thornier issues under the Act, such as, for example, the extent of the UK's jurisdiction over non-UK companies, the limits of third party liability, and the borderline between acceptable corporate hospitality and a prosecutable bribe," says Booyesen. Commenting further, Loxton said it was self-evident that the SFO was more likely to begin enforcement under the Act by seeking prosecutions in cases where there is clear criminal culpability, before it ventures on to tackle cases that test the boundaries of the Act. "As we have yet to receive an indication of the priorities of the SFO, it will be important for South African companies to apply their minds to this Act, and ensure they do not underestimate the extent and consequences of the Act," said Loxton.

South African companies doing business in the UK need to ensure that their anti-bribery control measures reach any of their "associated persons" throughout the world, even those whose connections to the company may be tangential. There are several factors South African companies will need to consider in relation to the Act, which relates to the four offences produced by the Act and it will be interesting to see whether the effects of the UK Bribery Act 2010 will reward whistleblowers in the UK or South Africa, as is currently the case in the USA.

Notwithstanding the outcome of such an incentive, the Act does place emphasis on self-reporting which will be a very important factor the UK courts will depend upon when deciding whether to prosecute or not. If a company takes it upon itself to self-report and has strong anti-corruption measures in place, the threat of prosecution is diminished. Furthermore, when a prosecution is not in the public interest, the SFO is likely to seek a civil settlement, as provided for by the UK Proceeds of Crime Act of 2002.

Of note, earlier this month the SFO obtained a civil recovery order from the British High Court requiring Oxford Publishing Limited (OPL) -- a wholly owned subsidiary of Oxford University Press -- to pay £1,895,435.00 plus prosecution costs. This amount represented the profits that OPL is thought to have generated through the unlawful conduct of its Kenyan and Tanzanian subsidiaries. These subsidiaries had offered and made payments, both directly and through agents that were intended to induce the recipients of the payments to award publishing contracts to these subsidiaries.

The benefit from their unlawful conduct was agreed to by the SFO and OPL to be the amount of £1,895,435.00, and this is how the SFO obtained the order for the recovery of that sum. Furthermore, Oxford University Press had to pay £320,000.00 to the World Bank as part of a negotiated settlement, and offered to donate a further £2,000,000.00 to non-profit organisations in sub-Saharan Africa for teacher training and other educational purposes. The World Bank debarred the two subsidiaries for three years, and imposed a conditional non-debarment on Oxford University Press.

Interestingly says Loxton, "in the OPL case the SFO decided not to prosecute, mostly because the key material obtained through the investigation was not admissible as evidence in the criminal proceedings. Furthermore, many of the relevant witnesses were located overseas, and were highly unlikely to cooperate with a UK investigation."

Booyesen concludes saying there's no doubt regarding the negative impact caused by bribery, specifically on developing countries which face this scourge on a daily basis. Not only is a country negatively affected at an economic and social level, the country's democracy is also threatened. The United Nations' Global Compact estimates that bribery adds 10 per cent to the cost of doing business in many parts of the world and adds at least 25 per cent to the cost of public procurement.

There's little wonder why foreign investment is chased away from those countries where bribery is rampant; the words of the World Bank President -- Robert B. Zoellick -- ring loud when he said that bribery is "a cancer that steals from the poor, eats away at governance and moral fibre, and destroys trust".

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