

THE DIFFERENCES BETWEEN US FOREIGN CORRUPT PRACTICES ACT AND UK BRIBERY ACT

The crimes of corruption and bribery are endemic mostly to developing and non-democratic countries. It has been witnessed that multinational corporations (MNCs) operating in such countries have largely engaged in commission of corruption and bribery. While the obligation to end the illegal activities of MNCs lies primarily with host states, their unwillingness or inability prompted the international community to develop strategies for fighting corporate corruption and bribery. This, in turn, has led to proliferation of several anti-corruption and anti-bribery legislations around the world.

A number of international organisations, such as the Organisation for Economic Co-operation and Development (OECD) and the International Chamber of Commerce (ICC), have adopted significant regulations to remove corruption and bribery from the global trade environment. States too have found it necessary to pass laws so as to control their companies conducting business beyond national borders. The most well-known state legislations are the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (UKBA). The FCPA and the UKBA are in fact the most effective global anti-corruption and anti-bribery laws because of their extraterritorial reach.

Both the FCPA and the UKBA include a tough set of rules prohibiting corruption and bribery. They envisage strict corporate liability for act or omission of their employees, agents or –in some cases- other associated entities. The companies falling under the jurisdiction of the FCPA and the UKPA are required to adopt rigorous and robust compliance policies. Such programs must be consistent with standards defined in the FCPA and the UKBA. However, although their stated goals are similar, the rules of FCPA and UKBA may be different in some respects. It is crucial for companies to acknowledge the distinction between the FCPA and the UKBA, as modelling their anti-corruption compliance programs only along one of them may not always be sufficient to escape responsibility under the other. The main difference between the FCPA and the UKBA thus must be known by companies operating on a global basis:

Jurisdiction:

The application of the FCPA and the UKBA is not confined to national territories. Both laws also can be applied extraterritorially. The jurisdictional scope of the FCPA includes any issuer registered or required to file reports to any U.S. stock exchange under the Securities & Exchange Act, all U.S. individuals and companies (other than an issuer) and individuals acting on behalf of such companies or individuals, and foreign entities that commit an offense while being in the territory of the U.S. The UKBA is applicable when the act or omission in question takes place in the UK irrespective of whether it is committed by UK or foreign companies and individuals. It also covers the cases outside the UK when the act or omission is committed by a person or entity closely connected with the UK. Section 12(4) of the Act lists who has a close connection with the UK.

Foreign Public Officials:

The FCPA criminalises bribes (anything of value) paid or offered to a “foreign government official”, while the UKBA prohibits bribes paid to “any person” to induce them to act “improperly”. Hence, the latter encompasses both public and commercial bribery.

The Nature of Offence:

Under the FCPA, the bribery must be made with a corrupt intent to “obtain or retain business”, whereas the UKBA does not stipulate the “intention” requirement. It rather focuses on an “improper action” rather than the business nexus.

Active Bribery vs. Passive Bribery:

The FCPA prohibits only payment of a bribe (active bribery). The UKBA, on the other hand, adopts a wider approach and criminalises also receiving bribes.

Corporate Liability:

Both laws envisage liability for corporations. The FCPA rules on corporate liability require public companies to devise and maintain a system of internal accounting controls. The UKBA creates a new form of corporate liability. It imposes a strict obligation on corporations for failure to prevent bribery of “associated persons” (agents, employees, subsidiaries, and etc.).

A company can escape from responsibility for failure to prevent bribery only through proving that it implemented an effective anti-corruption compliance program, which should

be designed with a view to issues of (i) risk assessment, (ii) top-level responsibility, (iii) due diligence, and (iv) effective implementation and monitoring of compliance policies and procedures.

Business Promotion Expenditures:

The FCPA permits reasonable and bona fide expenditure directly related to business promotion. In contrast, a business promotion expenditure can be possible under the UKBA only if it can be considered as a “proper” act.

Facilitating Payment:

The FCPA permits facilitating payments to a foreign official to expedite administrative processes, such as obtaining a licence or permit. But the UKBA does not contain such an exception.

Enforcement:

The UKBA covers only criminal proceedings which may be brought by the Director of Public Prosecutions, the Director of the Serious Fraud Office, or the Director of Revenues and Customs Prosecutions. On the other hand, the FCPA allows for the possibility of both civil and criminal proceedings being brought by the Department of Justice and the Securities and Exchange Commission.

Penalties:

An individual found guilty of an offence under the FCPA may be imprisoned up to five years and fined up to USD 250,000. As for entities, the FCPA includes fines up to USD 2 million. In case of books, records/internal control violations, individuals may face imprisonment up to 20 years and fines up to USD five million. The entities committing such violations may be fined up to USD 25 million. In case of the UKBA, the penalty for individuals includes imprisonment up to ten years and potentially unlimited fines. Under the UKBA regime, entities may also be fined unlimitedly.

Conclusion:

The FCPA and the UKBA impose stringent obligations on companies in order to combat corruption and bribery at a global level. Although they have been a cause of controversy, the jurisdictional scope of the FCPA and the UKBA reaching beyond national territories should prompt companies to act prudently and in line with the requirements laid

down in these tough regulations. That said, there exists certain dissimilarity between the material scope of the FCPA and the UKBA. Companies conducting business globally must be aware of the distinctions between these laws when developing and implementing anti-corruption compliance policies.