

UK Bribery Act:

A Tall Order India Cannot Ignore



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Indian companies looking to carry on business in the UK or with UK-based corporations should take note of the standards set by the Bribery Act due to the broad extra-territorial jurisdiction envisaged under the Act.



The 1st of July this year marked a momentous occasion in the world's fight against the menace of corruption. With the coming into effect of the Bribery Act, 2010 ("Bribery Act"), the UK Government put a bold foot forward and granted the battle against corruption its biggest shot in the arm yet. Tougher, more comprehensive and having a far wider reach than any prior anti-corruption legislation, the Bribery Act is arguably the most powerful and lethal weapon yet to be added to the ranks of the anti-corruption initiative across the globe. Applicable in England & Wales, Scotland and Northern Ireland, the Bribery Act replaces all of Britain's existing archaic and ineffective anti-corruption laws and is now the sole statute of reference for the criminalizing of corrupt payments to government officials. Beyond just revamping British anti-corruption legislation its impact will be felt and seen in the anti-corruption policies of governments worldwide, India included.

The Bribery Act takes anti-corruption-legislation beyond the boundaries established during the Foreign Corrupt Practices Act (FCPA)-era. It brings within its scope aspects of corruption that have thus far remained outside legislative purview. The tangible focus of the Bribery Act is to devise a suitable environment to enable enforcement agencies to carry

out effective prosecution of corporate entities that are facing charges of corruption in the UK or otherwise have a UK-connection.

In India, unlike in the UK, the Lokpal Bill, which is meant to tackle corruption in polity, has been waiting in the wings for many decades and despite recent public outcries, it will have to wait for yet another session of the Parliament to see the light of day.

This article captures the salient features of the Bribery Act, its impact on India and the lessons that it holds for India's drive against corruption.

An Overview of the Bribery Act

Bribery Offences

At the most fundamental level, the Bribery Act has widened the scope of what amounts to a "bribery offence" to include within its definition aspects that are not included under the FCPA. It imposes criminal liability upon not only the giver of the bribe but also on the receiver (the FCPA is applicable only to persons who are charged with giving a bribe). Requesting or agreeing to receive a bribe is also deemed to be an offence under this new legislation.

Unlike the FCPA, which allows certain permissible "facilitation" payments, i.e. payments made in order to ensure that legitimate services are provided in a timely manner, the Bribery Act entirely prohibits such payments. However, although there may not be a formal statutory exemption for such bribes, the Joint Prosecution Guidance, which was published by the Director of the Serious Fraud Office and the Director of Public Prosecution, suggests that prosecution, if any, in cases of single small payments are likely to attract only a nominal penalty.

Further, the Act extends to cases of bribery and corruption not just of foreign officials, as is the case with

the FCPA, but also to cases of such offences in the private sector. In this regard, it also recognizes an entity's failure to prevent bribery by an associated person as an offence. This is to say that a company will be liable for acts of bribery committed by its employees, agents or representatives, anywhere in the world, if such acts benefit the company in any way.

The maximum penalty for an individual found guilty of committing an offence under the Bribery Act is 10 years of imprisonment and/ or an unlimited fine. Corporate entities that are found to have committed an offence under the Bribery Act will be punishable with an unlimited fine.

Extra-territorial Jurisdiction

The extraterritorial jurisdiction granted

by the Bribery Act is broader and more far-reaching than any seen before. Citizens and residents of the UK and companies incorporated in the UK can be held criminally liable for acts of bribery wherever they may occur. In respect of offences where an entity has failed to prevent an act of corruption, the Bribery Act imposes corporate criminal liability on UK and non-UK based companies having business in the UK, equally, irrespective of whether any part of the offence took place in the UK or not.

This particular aspect has far reaching implications on a global scale as it makes the Bribery Act applicable not only to UK- incorporated business but also to any business with a UK presence in respect of its worldwide activities. These provisions are of significant importance to multinational



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companies that have business in the U.K. as it brings them within the ambit of this stringent law for their acts all over the world.

The Act provides for a statutory defence of “adequate procedure” i.e. to show that the entity put in place “adequate procedures” in order to prevent corruption or bribery. Adequate procedure is determined by reference to the guidelines issued by the Ministry of Justice which state that in order to avoid committing an offense or failing to prevent corruption or bribery, a company must devise and put in place adequate procedures, by taking into account the principles of

- i. Proportionality;
- ii. Top Level Commitment;
- iii. Risk Assessment
- iv. Due Diligence
- v. Communication; and
- vi. Monitoring and Review

Hospitality and Promotional Expenditures

Corporate hospitality has for long been viewed as an integral part of doing business. However, it isn't always clear when corporate hospitality crosses the line and becomes a bribe. Adopting a middle-of-the-road stance on the practice, the guidance permits “reasonable and proportionate” hospitality and promotional expenditures designed for improving a company's corporate image, marketing its products and services, or developing public relations. Reasonableness will be determined after consideration of the size of the organization, its nature of business as well as the customary practice in the particular industry. For example, an invitation to watch a tennis match at Wimbledon as part of a public relations exercise would not constitute a bribe. To put it simply, companies can steer clear of the Bribery Act so long as it can be shown that expenses incurred were necessary, reasonable and proportionate.

The Impact of the Bribery Act on India

India has considerable economic ties with the UK and therefore, the ramifications of the Bribery Act for India are far and wide, especially in light of the broadly drafted jurisdiction and liability clauses. While approaches may vary, Indian companies which have significant dealings in the UK or with UK based entities must now ensure that they have in place policies and practices compliant with the provisions of the Bribery Act. This will entail undertaking comprehensive due diligence as well as educating employees, agents and business associates as to what constitutes an offence under the Bribery Act. This must be accompanied by a mechanism for monitoring and reviewing business practices and creating an environment which encourages whistleblowers and ensures their safety. The bottomline is that the top echelons of management must have a strict zero tolerance approach to corruption and bribery in any form.

India's Battle against Corruption

While the UK has made fast strides towards stemming bribery, India's own track record against corruption leaves much to be desired; World Bank statistics ranking India as 133rd on the



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ease-of-doing-business index, and 84th in terms of freedom from corruption paint a sorry picture of a country otherwise tipped as the next big thing in foreign investment. The recently unearthed \$40 billion 2G spectrum scam has been ranked second only to the Watergate Scandal in TIME Magazine's list of, “Top 10 Abuses of Power”. The Commonwealth Games scam, the Satyam scam, the Indian Premier League scam and the Cash for Query scam among others have shook the nation's conscience leading to a public outcry against the government's apathy towards tackling corruption.

At least for the time being, the focus in India is more on curbing venality in public offices rather than in the corporate space. The Lokpal Bill, which has atrophied for a staggering span of over four decades, has been dusted off recently for another round of debating, this time differences persisting on whether the highest offices of the government must be brought under the ambit of the Bill. With the Bill scheduled to be tabled in Parliament in the upcoming Monsoon Session, it is hoped that for once the impending legislation will marry lofty ideals with practicality and not create yet another paper tiger.

It is evident that there is a wide discrepancy between the situation in India and Britain. While the battle against corruption is still in its nascent stages in India, the UK has introduced the boldest legislation yet in this respect. There is no telling as to when legislation in India will match up to the tall order set by the Bribery Act. However, all is not lost, for the positive repercussions of this landmark legislation will be felt in India too. In the meanwhile, Indian companies looking to carry on business in the UK or with UK-based corporations could do well by taking note of the standards set by the Bribery Act due to the broad extra-territorial jurisdiction envisaged under the Act.

