

ARTICLE

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SOMETHING BREWING AFTER DECADES OF TALK: UK BRIBERY ACT 2010

The world could learn a few lessons through the actions taken by the United States, considering the manner in which they have taken concrete steps against bribery and corruption. Certainly, the adage that “when America goes big”, it really does so with everything its got -- without exception -- and even when high profile individuals need to be taken to task.

Since President Obama took office, there have been more than 40 guilty pleas, deferred or non-prosecution agreements and more than US\$ 2bn in criminal penalties, all in an effort to crack down on bribery and corruption in business contracts, which is a big priority for the Justice Department under the Obama administration. Most cases have resulted in settlements or plea agreements, with large penalties, rather than trials. Notably the self-confessed Ponzi scheme operator, Bernie Madoff who defrauded thousands of investors of billions of dollars -- and estimated at US\$ 65bn -- has personal experience of the might of the Foreign Corrupt Practices Act of 1977 (FCPA). And who would have thought that Bernie, a trusted and respectable leader in American society, who also happened to be the former non-executive chairman of the NASDAQ stock market, would stoop to this level?

So why are there not many more executives and other high profile leaders being held to account when they are caught red-handed, and given the same treatment as Bernie Madoff who received the maximum jail sentence of 150 years when he was convicted of fraud? Could it be that he was the unlucky one, and that those who are not brought to book have been provided unfair protection; or are they above the law; or is it simply that there is little force behind the law that allows them to escape serious jail sentences?

A recent web survey conducted by Deloitte LLP revealed some interesting facts about the two most spoken of pieces of anti-bribery legislation, namely the Foreign Corrupt Practices Act of 1977 and the UK's Bribery Act of 2010. Many of the respondents surveyed were of the opinion that business leaders are more concerned about the FCPA -- established by the US -- as compared to the UK's Bribery Act. Of course there may be a number of reasons why 57% of the business leaders surveyed may have decidedly brushed the UK Bribery Act aside.

One would like to believe that those who indicated their lack of concern regarding the implications of the UK Bribery Act did so because these individuals have already put tough anti-bribery measures in place, whilst presumably also having set the correct tone against this scourge. Surely this would be the only reason why they are seemingly so relaxed about the UK's Bribery Act? But, can we rest upon this presumption; and is this the *real reason* why so many business leaders have not concerned themselves with the UK's Bribery Act as much as they did for the FCPA? Might it be that many of these business leaders have -- in light of the few FCPA and UK Bribery convictions -- become brazen toward any regulatory attempts to curb this 'cancer' which has become so deeply ingrained within the public and private sectors?

Similar to the findings of Deloitte's web survey on the UK Bribery Act which was conducted across almost 2000 people in May 2012, the findings of KPMG's *Doing Business Under the UK Bribery Act Survey 2012* also had some interesting responses from their respondents. Interestingly, the KPMG survey showed that 75% of third party intermediaries pose their respondent's firms the biggest challenge of falling short of the UK Bribery Act. Moreover, while 59% of the KPMG surveyed respondents had adequate procedures in place to conduct due diligence checks on their third party intermediaries, only 47% of these respondents actually had anti-corruption provisions built into their supplier's contracts.

Whilst the UK Bribery Act has now been in place for just over a year, considering the seemingly low reaction to it's undeniable, yet heavy penalties for non-compliance which includes jail sentences of up to ten

years with an unlimited fine; business leaders across the world are cautioned not to pass this one by too quickly. To this end, it would appear that many regulators worldwide are intent on clamping down upon the most serious perpetrators of bribery and corruption, which the World Bank conservatively estimates to cost the world economy an amount in excess of US\$ 1 trillion per annum. Of course this does not include the damages bribery and corruption causes through ethical and social decay.

Many business leaders still argue that these anti-bribery laws will seriously reduce their competitive advantage; and this could explain yet another reason for their scant regard toward compliance in these areas. If the truth be told, one could argue that the penalties attached to being convicted of bribery are still far too low, and it would appear that the 'rewards' attached to these business irregularities still far exceed the fines; even where the fines are attached to the company's turnover!

So, its business as usual . . .

Upon deeper reflection, it may not be such a good idea to simply brush aside these laws, and South Africa certainly can add its own Prevention of Corrupt Activities Act (2004) to this brewing pot, which legally compels companies and individuals to report all corruption, including incidents of bribery, fraud, theft, extortion, forgery and uttering. So it would seem that enforcement activities are becoming more 'fashionable speak' and indeed moving beyond mere 'talk shops' as countries begin to introduce more draconian steps to tackle this endemic problem. It should be quite interesting to see just how many more top notch business leaders and other perpetrators -- who believe they are above the law -- will be joining the ranks of Bernie Madoff.

Companies and their leaders would be wise to inform themselves of these anti-bribery and corruption pieces of legislation. Interestingly the UK's Bribery Act 2010 goes well beyond the provisions contained in the FCPA and indeed even our own bribery law in South Africa. Companies across the world can be held responsible -- through the UK Bribery Act -- for bribery carried out by its employees without its knowledge or consent, and such where any UK company or its citizens are involved. The company will also be held responsible if it cannot prove that it has 'adequate procedures' in place to prevent bribery throughout its supply chain. Interesting times lie ahead . . .

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