



Impact of the UK Bribery Act 2010 on UK, Swedish and other foreign organisations doing business in the UK

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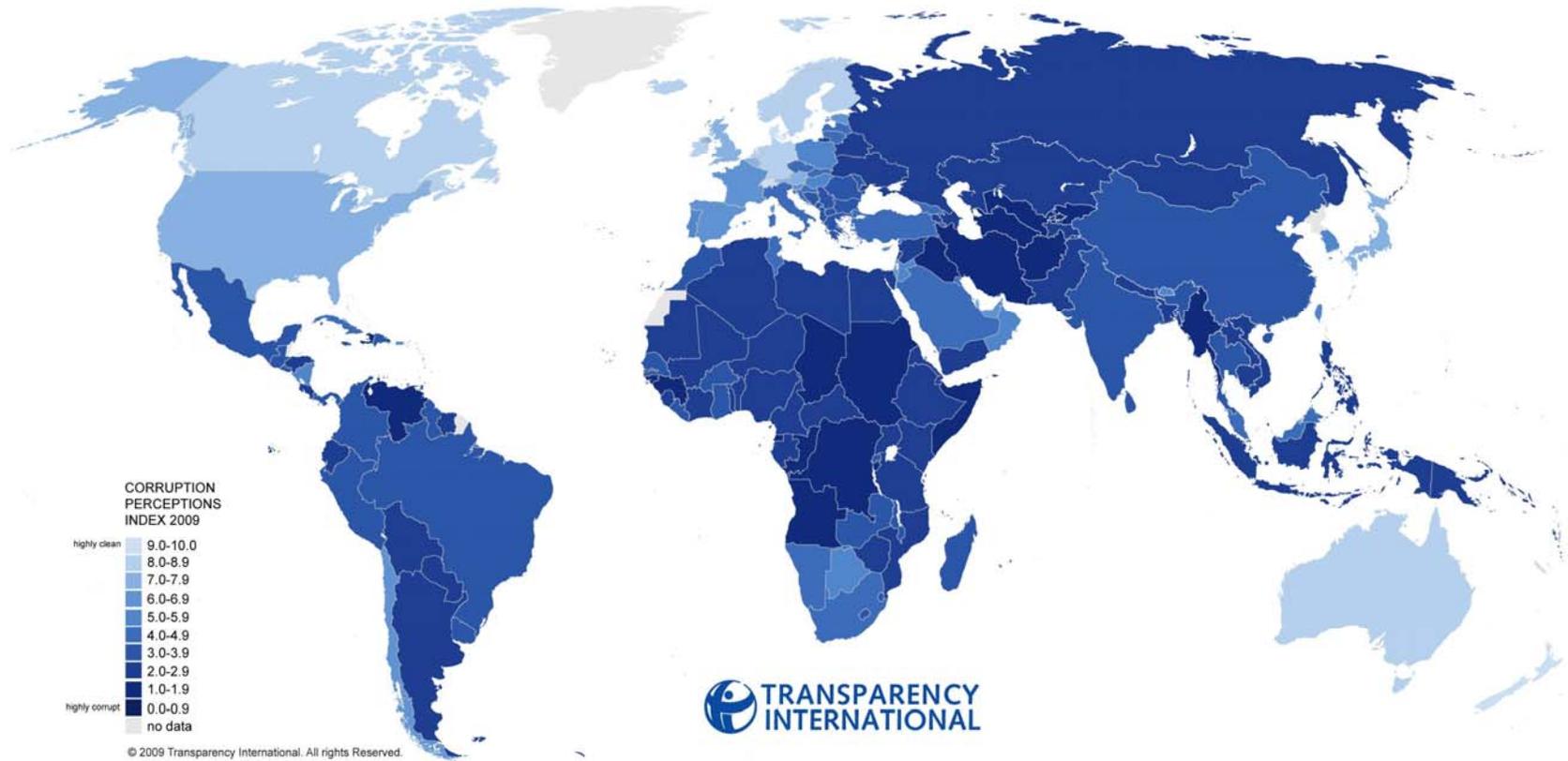
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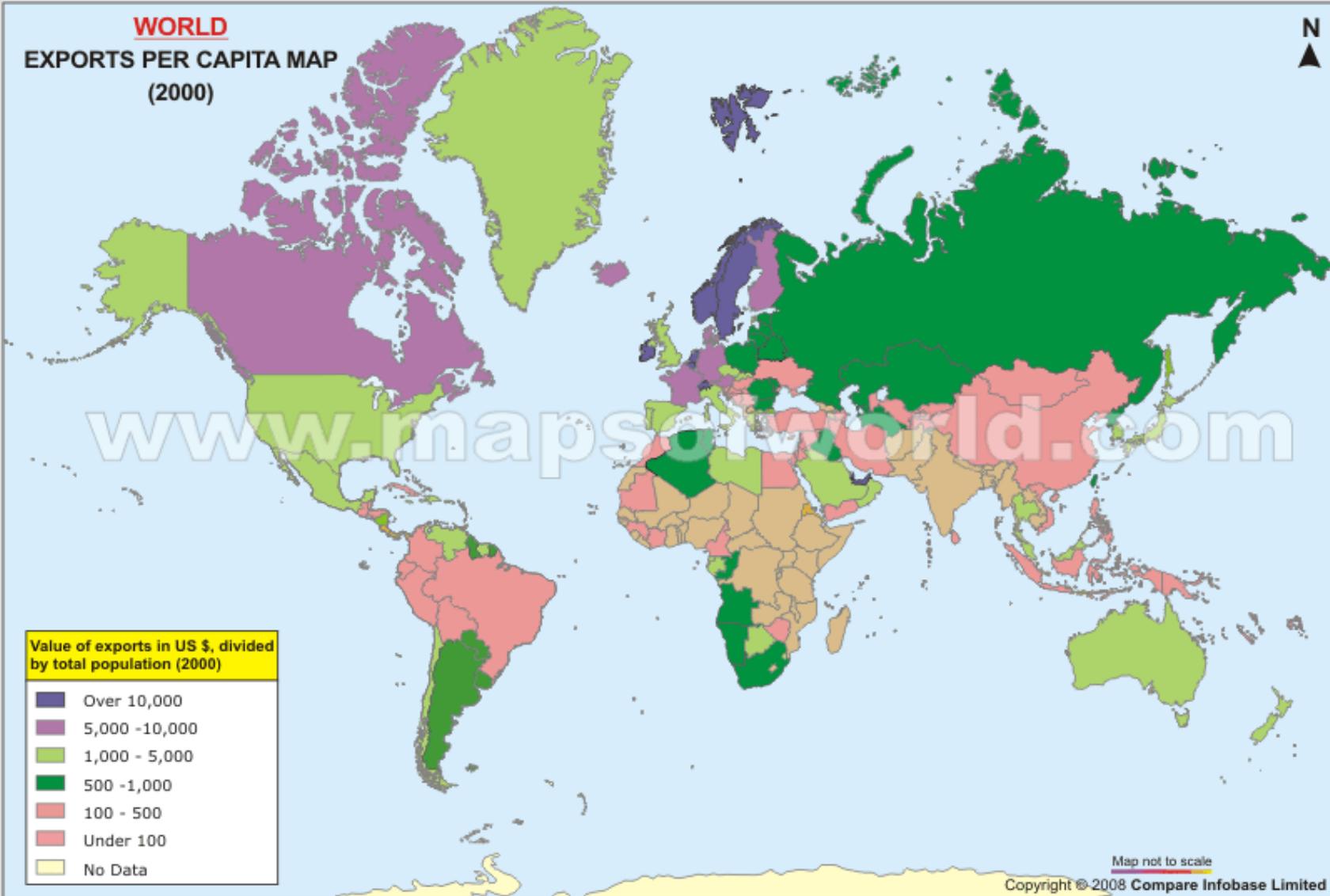
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WORLD
EXPORTS PER CAPITA MAP
(2000)



Why does the UK Bribery Act affect Sweden and Swedish companies?

- Do you have a subsidiary in the UK?
- Is your company registered or listed in the UK?
- Is one of your directors a UK national?
- Is one of your directors resident in the UK?

Changing enforcement climate

- Background to the Bribery Act 2010
- UK implemented the OECD Convention on Combating Bribery of Foreign Public Officials in 2001
- BAE Systems case (2006) Tanzania/Czech Republic/Romania/South Africa/Saudi Arabia
- More vigorous enforcement has already begun
- Tighter budgets but “virtuous cycle” of fines

Changing enforcement climate (continued)

- The new Lord Chancellor, Ken Clarke (who is also the champion of anti-corruption, a personal appointment of the Prime Minister) launched on 14 September 2010, a public consultation on the forthcoming government guidance.
- Unlimited fines
- Huge legal costs
- Possible debarment from public contracts
- Up to 10 years in prison
- Fines affect shareholders by a factor of 10 [Financial Times 20.09.2010]

Offences

The Bribery Act creates four new offences

- Two general offences:
 - The active offence of **offering, promising** or **giving** a financial or other advantage (Section 1)
 - The passive offence of **requesting, agreeing to receive** or **acceptance** of a financial or other advantage (Section 2)
- The active offence of **bribing a Foreign Public Official** (Section 6)
- A strict liability offence for commercial organisations for **failing to prevent bribery** being committed (Section 7)
- There is liability for a senior officer who **knows of** or **connives in** bribery (Section 14)

Offering a bribe (Section 1)

It is an offence to **offer**, **promise** or **give** a financial or other advantage to another person with a view to inducing a person to perform improperly a relevant function or activity

- “other advantage” could include, for example, a promise of a job
- (Section 5) Expectation test: *“What a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned”*

Receiving a bribe (Section 2)

It is an offence to **request**, **agree to receive** or to **accept** a financial or other advantage in return for the **improper performance** of a **relevant function** or activity.

Discrete offence of bribing Foreign Public Officials (Section 6)

A “foreign public official” is an individual who:

- Holds a **legislative, administrative** or **judicial** position of any kind outside the UK; or
- Exercises a **public function** for a foreign country or for any public agency or public enterprise of that country; or
- Is an official agent of a public international organisation

Bribery of Foreign Public Officials (Section 6)

It is an offence for a person to **influence** a Foreign Public Official (“FPO”) in that person’s capacity as such by:

- **Offering, promising** or **giving** any financial or other advantage to FPO or to another person at FPO’s request or with FPO’s assent or acquiescence, with a view to...
- **Obtaining** or to **retaining** business or an advantage in the conduct of business

Bribing Foreign Public Officials (Section 6)

It is a defence to show that the FPO is permitted under the local **written** laws applicable to the FPO to be influenced in the FPO's capacity by the bribe

Personal Liability of Senior Officer of a corporate body (Section 14)

- Applies if a body corporate commits a section 1, 2 or 6 events.
- **Consent** or **connivance** of a senior officer of a body corporate or someone purporting to act in that capacity is required.
- The senior officer must have a **“close connection”** with the UK.

Strict liability offence: failure of commercial organisations to prevent bribery (Section 7)

A relevant commercial organisation is guilty of an offence if **a person associated** with the organisation bribes another person with the intention of either

- **Obtaining** or **retaining business** for the organisation, or
- **Obtaining** or **retaining** an **advantage** in the conduct of business for the organisation

Failure of commercial organisations to prevent bribery

A “relevant commercial organisation” is defined as either:

- A body or partnership incorporated or formed **in the UK** and which carries on a business; or
- A body corporate or partnership incorporated or formed **outside** the UK which carries on a business, or part of a business, in any part of the UK

Failure of commercial organisations to prevent bribery (Section 8)

A person is associated with the organisation if they perform services for or **on behalf of** the organisation.

The defence to Section 7: adequate anti-corruption procedures in place (Section 7(2))

It is a defence if the relevant commercial organisation can show that it has put in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking corrupt activities.

What are adequate procedures?

- Guidance to be issued by the Ministry of Justice
- Letter from Lord Bach to House of Lords (December 2009)
- Guidance by Transparency International UK in July 2010

What are adequate procedures? (continued)

- “Quick Start Guide” issued by the Government on 14 September 2010. Six principles:
 1. Risk assessment
 2. Top level commitment
 3. Due diligence
 4. Clear, practical and accessible policies and procedures
 5. Effective implementation
 6. Monitoring and review

Comparing the FCPA and the UK Bribery Act

Although the Bribery Act is similar to the FCPA, it has taken the model several steps further. Notable differences include:

- Coverage of activities unrelated to governmental officials
- Business nexus

Comparing the FCPA and the UK Bribery Act (continued)

Notable differences (continued):

- Scope of the strict liability corporate offence.
- Facilitation or “grease” payments.

Comparing the FCPA and the UK Bribery Act (continued)

Notable differences (continued):

- Bona fide business expenditures
- The impact of local law

Recent International Corruption Cases

Daimler AG (2010)

Earlier this year, German vehicle manufacturer Daimler AG entered into a \$185 million settlement of FCPA violations based on millions of dollars worth of improper inducements designed to secure hundreds of millions of dollars' worth of vehicle sales.

Recent International Corruption Cases

Siemens AG (2008)

- Fines and costs circa \$2billion.
- US law enforcement praised Siemens for the affirmative steps the company took to counter corrupt activities once the scandal surfaced.

Recent International Corruption Cases

Swedish Cases 2005-2010

- ABB – Mexico and Iraq
- SAAB fighter jet sales to Czech Republic and Austria
- SKANSKA – Argentina
- Volvo/Atlas Copco/Scania – alleged kickbacks to Iraq in oil for food program
- Systembolaget – state owned alcohol monopoly
- IKEA – Russia
- ABB – investigated cases in Asia, South America and Europe – self-reported to the US authorities.
- Countermine Technologies AB

The OECD: Whilst Sweden has made “commendable” progress to implement the OECD anti-bribery convention, its 2005 report criticised Sweden in the area of corporate bribery of foreign officials: “companies are rarely held liable in Sweden”.

Corruption has two sides: the corrupter is often from the rich West. As the “global village” grows, so will the problem of international corruption.

Looking ahead

- The priority must be to put in place adequate procedures and a comprehensive compliance programme.
- Existing anti-corruption systems must be reviewed and updated.
- Compliance with the FCPA will not be enough for the UK Bribery Act.
- The Ministry of Justice announced on 14 September 2010 an eight week public consultation period.

Looking ahead (continued)

- Enforcement expectations
 - Vigorous enforcement. Two stage test before prosecution:
 - A reasonable prospect of conviction;
 - Is the prosecution in the public interest?
 - Cooperation between foreign enforcement agencies:
 - DOJ and the SFO
 - 14 September 2010 Charles Duross, Deputy Chief of the Fraud Section of the DOJ:
 - “There have never been more defendants under investigation than now...over 100 cases currently...billions of dollars in fines...working all the time with the UK authorities”*
- Self-reporting

Looking ahead (continued)

- Whistle Blowing
- No plea bargaining concerning sentencing in UK:
 - R v Innospec Limited [26 March 2010]
 - R v Dougall [2010] EWCA Crim 1048

Looking ahead (continued)

- Attorney-General, Dominic Grieve (“There is the principle of the primacy of the courts in the UK...this cannot be usurped by private deals”)
- Also, “Companies need to walk the walk, not just talk the talk”
- Former Attorney-General, Lord Goldsmith (“The Serious Fraud Office’s efforts to do deals have been thwarted by the Lord Chief Justice...my experience is that if prosecutors cannot do deals in the public interest, it will be more difficult to conduct prosecutions...”)

Looking ahead (continued)

INADEQUATE COMPLIANCE

- A Financial Services Authority (“FSA”) report on the insurance broking industry in the UK, when reporting on corruption and anti-corruption compliance within the industry (May 2010) made several useful observations which have general application to all businesses.

Looking ahead (continued)

- Very weak due diligence on, and monitoring of, third party relationships and payments with a worrying lack of documentary evidence of due diligence taking place.

Looking ahead (continued)

- Very little or no specific training was provided on anti-bribery and corruption, even for staff in higher risk positions.

Looking ahead (continued)

- Virtually no firms took steps to identify unusual payments to third parties.
- Inadequate compliance and internal audit monitoring of anti-bribery and corruption work.
- Weak vetting of staff compared with other financial sectors.
- Some firms gave large cash advances to staff to assist travelling in higher risk countries where they said credit cards were not readily accepted.

Looking ahead (continued)

- Some firms awarded their brokers large bonuses directly related to the income or profit they generated.

The FSA's Conclusions

- “At present, we judge that the serious weaknesses identified in some broker firms’ systems and controls mean there is a significant risk of illicit payments or inducements being made to, or on behalf of, third parties to win business.”

Our Conclusions

- The Bribery Act 2010 almost certainly applies to your business if you have any sort of connection with the UK
- An adequate compliance programme is the only defence to prosecution for businesses, otherwise unlimited fines, large legal costs, debarment from public procurement, damaged reputation
- The compliance programme needs to cover your whole group, and not just the UK branch/subsidiary
- The Act will be in force in April 2011

Questions or Comments?

McGuireWoods Anti-Corruption Group

- Risk assessments
 - Audits
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- Training programmes
 - Due diligence

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