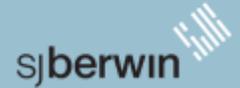


Business Litigation Alert

Alert of recent court decisions and legal developments from SJ Berwin
13 July 2011



WILL FOREIGN COMPANIES FALL FOUL OF THE BRIBERY ACT?

The Bribery Act 2010 (the "Act") came into force on 1 July 2011. One of the Act's most controversial aspects is its significant extra-territorial impact and the extent to which it will apply to foreign commercial organisations which carry on business in the UK or are listed on UK stock exchanges.

Commercial organisations which commit an offence under section 7 of the Act (failing to prevent bribery on their behalf) face criminal liability under the Act regardless of where in the world the relevant bribery offence is committed. The definition of "commercial organisation" includes a body or partnership formed outside of the UK which carries out business or part of its business in the UK. Foreign companies, partnerships and other commercial entities which have a presence in the UK are all therefore potentially caught by the Act's wide-ranging provisions.

The Ministry of Justice's official Guidance on the Act seeks to play down the potential impact of the Act on non-UK entities. It states that "...whether such bodies can properly be regarded as carrying on a business or a part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach...applying a common sense approach would mean that organisations that do not have a demonstrable business present in the United Kingdom would not be caught..."

The Guidance gives two specific examples where non-UK companies could have a presence in the UK - having shares listed on a UK stock exchange and having a UK subsidiary - and concludes that "*The Government would not expect...the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as...falling within the definition of a 'relevant commercial organisation'...Likewise, having a UK subsidiary will not in itself, mean that a parent company is carrying on a business in the UK...*"

Despite the clear statements in the Guidance, however, the Serious Fraud Office ("SFO") has recently suggested that it may take a more aggressive approach towards non-UK companies than was previously thought to be the case. When asked whether all companies listed in the UK potentially fall under the remit of the Act, the Director of the SFO, Richard Alderman, said "*We will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK.*"

It remains to be seen just how far the courts will be prepared to push the meaning of "relevant commercial organisation". However, the warnings from the SFO are clear. Just because a non-UK business does not have an office or presence in the UK, or if it is simply listed on the London Stock Exchange without any other connection to the UK, will not necessarily mean that it will escape prosecution under the Act.

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