GLOBAL LEGISLATION TO TRUMP CORRUPTION

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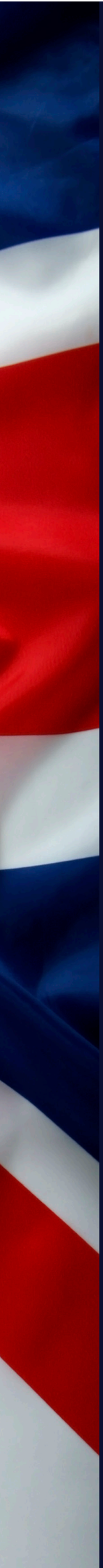
On the face of it, South Africa has a strong legal framework to address corruption. Relevant legislative enactments include the Prevention and Combating of Corrupt Activities Act; the South African Companies Act; the Financial Intelligence Centre Act (FICA); the Broad-based Black Economic Empowerment (B-BBEE) Act, as amended; and the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, to name but a few. There are dedicated and competent officials mandated with identifying and appropriately dealing with corruption, such as the Public Protector, the National Prosecuting Authority, the recently established B-BBEE Commission and the South African National Accreditation System. In addition, since 2007, South Africa has been a voluntary signatory to the Organization for Economic Cooperation and Development (OECD)[1]. Despite this, South Africa did not fair well in the 2015 Transparency International Corruption Index, where it occupied position 61 out of 167 participating countries[2].

OECD Recommendations

Many organisations are beginning to address corruption by putting remedial measures and controls in place. However, government intervention is paramount in reducing the scourge of bribery, extortion and/or bribe solicitation. One positive step in 2010 was the introduction of requirements that oblige South African organisations to adopt the OECD recommendations on Combating Bribery, Bribe Solicitation and Extortion (2011), which must be implemented in terms of regulation 43 of the South African Companies Act, (71 of 2008), as amended. These recommendations require organisations to:

- not pay or demand bribes;
- have an anti-bribery/corruption policy;
- develop internal processes and controls to mitigate the bribery risk;
- keep fair and accurate books and records;
- perform an anti-bribery risk assessment to identify bribery risks in the organisation;
- perform due diligence on agents, intermediaries and consultants, to ensure that they do not pay bribes on behalf of an organisation;
- educate employees and agents on anti-bribery processes and publicise their anti-bribery initiatives; and
- avoid unlawful political contributions.



As South African companies across industry sectors begin to come to grips with implementing robust anti-bribery and corruption programmes in order to comply with these requirements, we will gradually see a reduction in corruption in South African society. The key objective of the anti-corruption obligations imposed on organisations is to neutralise the ability of the private sector to pay bribes. In doing so, it aims to reduce corruption levels in respect of public sector corruption, as bribes are invariably paid by corrupt organisations.

In addition, the South African authorities are currently reviewing the role of the Chief Procurement Officer (CPO) within the National Treasury, with a view to ensuring that the office of the CPO will have greater powers to investigate and penalise corrupt organisations.This initiative is likely to address tenders and procurement in the public sector, where a new breed of ruthless capitalists, often described as "tenderpreneurs", have won lucrative government tenders by simply bribing procurement or adjudicating tender officials.

Organisations should regard the OECD recommendations as normal business practice, as they amount to good corporate governance and commitment to doing business ethically, and spell out key procedures required to mitigate bribery risks.

The Companies Act

Failure to comply with the Companies Act requirement to implement the OECD requirements may result in an organisation being issued a directive to comply. However, if that compliance order is flouted, an organisation could face a fine of up to R1-million. A revision of the South African National Anti-Corruption Strategy is currently under way, in terms of consideration being given to dramatically increase penalties for non-compliance. Serious contemplation is being given to increasing penalty levels that are similar to the multi-million dollar penalties imposed by global regulators, such as the Department of Justice and the Securities and Exchange Commission in the United States (US) and the Serious Fraud Office in the United Kingdom (UK), regarding enforcement actions related to the Foreign Corrupt Practices Act (FCPA)[3] and the UK Bribery Act (UKBA)[4], respectively.

South African organisations that fall under the jurisdiction of the Companies Act and are required to adopt the OECD requirements, are identified as follows:

- every state-owned company;
- every listed public company;
- any other company that has, in two of the previous five years, scored more than 500 points in relation to regulation 26(2).

The score is determined by:

- one point per average employee number;
- one point per every rim in third-party liability;
- one point for every rim in turnover;
- one point for every person with direct/indirect beneficial interest in issued securities; and
- one point per member or per association that is a member of non-profit organisations.

Regulation 43 of the Companies Act introduced a requirement for organisations to establish a social and ethics committee. Among a host of duties in promoting good corporate citizenship and ethics, its responsibility includes the reduction of corruption by, ensuring that an organisation adopts and implements the OECD recommendations on reducing corruption. The duties of the social and ethics committee, based on the OECD recommendations on combating bribery, bribe solicitation and extortion, are summarised as follows:

- Monitor an organisation's activities regarding any relevant legislation, other legal requirements or prevailing codes of best practice, in matters relating to social and economic development. This includes an organisation's standing in terms of their goals and purposes of:
  - the 10 principles set out in the United Nations' Global Compact. Principle 10 stipulates that organisations should work against corruption in all its forms, which include extortion and bribery;
  - the OECD recommendations regarding corruption;
  - the Employment Equity Act; and
  - the B-BBEE Act.

- Ensure good corporate citizenship, including the organisation's:
  - promotion of equality, prevention of unfair discrimination, and reduction of corruption;
  - contribution to development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
  - record of sponsorship, donations and charitable giving.

- Oversee issues relating to the environment, health and public safety, as well as the impact of an organisation's activities, products or services.

- Consumer relationships, which incorporate an organisation's advertising, public relations and compliance, in line with consumer protection laws.

- Labour and employment issues:
  - evaluate the organisation's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and
  - appraise an organisation's employment relationship and contributions toward the educational development of its employees.

- Draw matters within its mandate to the attention of the board, as the occasion requires.

- To report, via one of its members, to the shareholders at the organisation's annual general meeting on the matters within its mandate.

Other important local anti-corruption laws include, the Prevention of Combating of Corrupt Activities Act, (12 of 2004) and the Financial Intelligence Centre Act, (38 of 2001).

Prevention and Combating of Corrupt Activities Act

Facilitation payments have always been illegal in South Africa. In terms of the Prevention and Combating of Corrupt Activities Act (12 of 2004), it is a criminal offence to provide any form of 'gratification' to an official if it is not lawfully due. The act of bribery is further regulated by this Act, which provides:

"any person who directly or indirectly gives or accepts or agrees or offers to give or accept any gratification from another person with the purpose of acting personally or influencing another person to act in a manner that amounts to an illegal, dishonest, or unauthorised action or an abuse of authority, a breach of trust, or a violation of a legal duty is guilty of an act of corruption."

In addition to the general offence of corruption, the Act sets out an entire series of 'corrupt activities', which include the corruption of public officials, as well as foreign government officials. The Act addresses corruption related to, among others, tenders, contracts, agents, members of the legislature, members of the judiciary, sporting events and games of chance. Globally, lengthy periods of imprisonment are often imposed on individual offenders convicted of corrupt activities. The mandatory minimum sentence for corruption in terms of the South African sentencing guidelines, is direct imprisonment for a period of 15 years.

What is clear in South Africa, is that has an excellent legislative framework in place for tackling corruption, which is making minor inroads against offenders, however, concerns have been raised about enforcement.

Presently the South African authorities do not impose substantial penalties on organisations implicated in corruption. Nevertheless, the South African government has recently come out strongly in favour of lifestyle audits on government officials, coupled with enhanced processes to initiate action to address corruption[5]. South Africa can learn from measures adopted by global regulators against organisations that bribe.

Global Consequence of Corruption

As many organisations and individuals fly under the radar of culpability within South African borders, the global playing field, in regard to accountability for corruption, has changed drastically in the last few years.

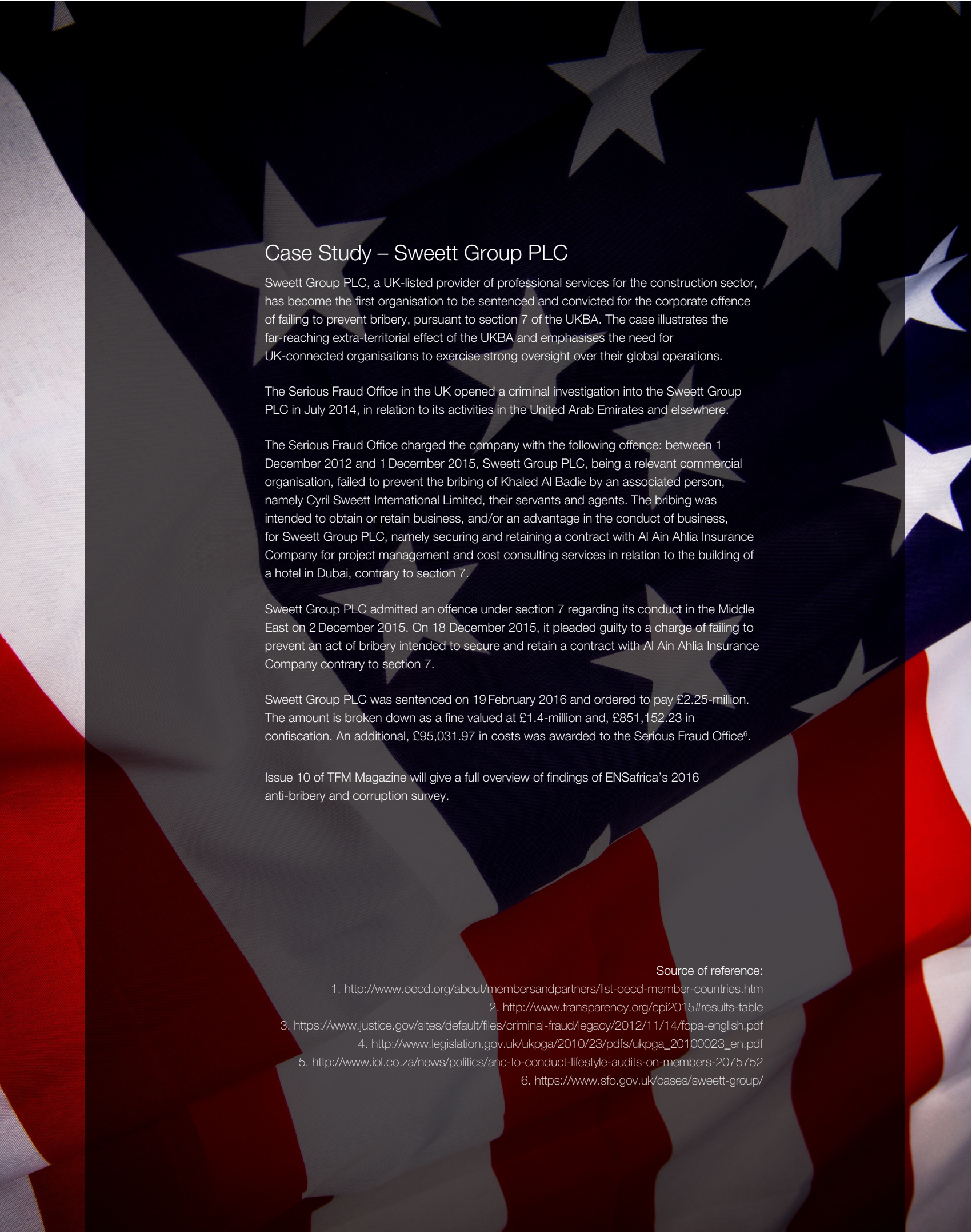
For some time, anti-corruption campaigners and activists have been urging South African authorities to consider the adoption of legislation similar to that of the UKBA, which came into effect in July 2011[4]. Through its innovation, a new corporate offence, "the failure by a commercial organisation to prevent bribery," has been compelling organisations associated with the UK to take robust anti-corruption measures. The UKBA is similar to the FCPA[3] and, like US legislation, it makes provision for extra-territorial jurisdiction by the UK regulators in respect of acts of corruption committed by organisations associated with the UK. This is irrespective of whether the act of corruption took place in the UK or elsewhere and irrelevant to where the organisation in question is registered or located in the world.

The UKBA is not only aggressive but it has more far-reaching consequences for South African organisations than the FCPA, as it gives the Serious Fraud Office the power to impose fines for the failure to prevent bribery. Unlike the FCPA, the UKBA applies to both public and private sector corruption and it has further criminalised facilitation payments.

The US remains the most robust global enforcer of corruption violations. A critical factor for South African organisations is that the US Department of Justice adopts an extensive approach to jurisdiction and has cautioned it will find jurisdiction in respect of bribes paid to foreign government officials. One way to do so, is if payments are routed through US dollar accounts or e-mails, which are merely transmitted through US-based servers. Accordingly, South African organisations, which may not ordinarily regard themselves as subject to the FCPA, may inadvertently become subject to the extra-territorial jurisdictional reach of the FCPA. For example, in the event of a bribe being paid to a foreign government official by an employee in a subsidiary in Africa, the prosecution thereof could take place in South Africa. However, the perpetrators could face prosecution in the US as well.

It is only a question of time before the South African government implements drastic measures against corruption, similar to those of the UK and US. It is, therefore, imperative that South African organisations initiate robust anti-corruption programmes to comply with and avoid UKBA and FCPA prosecution and, of course, as part of their good governance, conform to the South African Companies Act.

In conclusion, in today's current global and local anti-corruption compliance environment, it would be reckless for any board of an organisation not to pay serious attention to creating an anti-bribery culture within their organisation. Non-compliance with anti-corruption requirements has far-reaching consequences and is a risk that has to be appropriately managed within every organisation.



Case Study – Sweett Group PLC

Sweett Group PLC, a UK-listed provider of professional services for the construction sector, has become the first organisation to be sentenced and convicted for the corporate offence of failing to prevent bribery, pursuant to section 7 of the UKBA. The case illustrates the far-reaching extra-territorial effect of the UKBA and emphasises the need for UK-connected organisations to exercise strong oversight over their global operations.

The Serious Fraud Office in the UK opened a criminal investigation into the Sweett Group PLC in July 2014, in relation to its activities in the United Arab Emirates and elsewhere.

The Serious Fraud Office charged the company with the following offence: between 1 December 2012 and 1 December 2015, Sweett Group PLC, being a relevant commercial organisation, failed to prevent the bribing of Khaled Al Badie by an associated person, namely Cyril Sweett International Limited, their servants and agents. The bribing was intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett Group PLC, namely securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai, contrary to section 7.

Sweett Group PLC admitted an offence under section 7 regarding its conduct in the Middle East on 2 December 2015. On 18 December 2015, it pleaded guilty to a charge of failing to prevent an act of bribery intended to secure and retain a contract with Al Ain Ahlia Insurance Company contrary to section 7.

Sweett Group PLC was sentenced on 19 February 2016 and ordered to pay £2.25-million. The amount is broken down as a fine valued at £1.4-million and, £851,152.23 in confiscation. An additional, £95,031.97 in costs was awarded to the Serious Fraud Office[6].

Issue 10 of TFM Magazine will give a full overview of findings of ENSafrica's 2016 anti-bribery and corruption survey.

Source of reference:

1. http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm
2. http://www.transparency.org/cpi2015#results-table
3. https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf
4. http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf
5. http://www.iol.co.za/news/politics/anc-to-conduct-lifestyle-audits-on-members-2075752
6. https://www.sfo.gov.uk/cases/sweett-group/