

反贿赂和腐败法40年来在美国都是热门话题。历史上这个话题在欧洲获得的关注度较少。但这种情况正在改变，因为欧洲开始迎头赶上，并且许多欧洲国家已经实施比美国更为严厉的反贿赂法。近期发生的事件已重新将该议题提上日程，我们可以期待未来会有更多关于欧洲反贿赂法效力和作用的讨论。

Anti-bribery and corruption has been a hot topic in the US for almost 40 years. The topic has historically however received much less attention within Europe. That is now changing as Europe is beginning to catch up and many European countries have already implemented anti-bribery laws much stricter than those in the US. Recent events have put the topic back on the agenda and we can expect further debate on the effectiveness and efficacy of enforcement in Europe.

欧洲范围内的腐败水平总体而言相当好。“透明国际”公布的一项年度腐败指数显示了全球175个国家的腐败水平。在2014年的报告中，整个欧盟和西欧的平均得分为66（0是高度腐败，100是高度廉洁），比全球平均水平43分要高得多。即使欧盟和西欧中得分最低的国家，例如希腊、罗马尼亚和意大利，得分亦达43，与全球平均水平一致。实际上前10个腐败程度最低的国家中有7个是欧洲国家（丹麦、芬兰、瑞典、挪威、瑞士、荷兰和卢森堡）。

The levels of perceived corruption within Europe are generally quite good. Transparency International publish an annual Corruptions Perceptions Index which shows the perceived levels of corruption in 175 countries globally. In its 2014 report, the average score across the EU and Western Europe was 66 (with 0 being highly corrupt and 100 being very clean), much better than the global average of 43. Even those countries with the lowest scores in the EU and Western Europe, being Greece, Romania and Italy, had a score of 43, consistent with the global average. Seven of the top 10 least corrupt countries are actually in Europe (Denmark, Finland, Sweden, Norway, Switzerland, Netherlands and Luxembourg).

在过去五年左右的时间，欧洲国家一直在检讨其现有反贿赂和腐败机制的不足，并且某些国家已经首次实施反腐败法。以下是我们对某些反腐败具体制度及其异同的考察。实际上大多数国家（即使不是全部）的反腐败法比美国还要严苛。欧洲法律和美国法律的差异令许多机构和组织表示诧异，这些机构和组织目前正按照美国的反腐败法行事，而现在他们需要进一步改进他们的行事方式，以符合更严格的制度。

Over the last five or so years, countries within Europe have been overhauling their existing, in many cases insufficient, anti-bribery regimes and some countries have implemented anti-bribery laws for the first time. We consider some of the specific regimes below along with their differences and similarities. The majority, if not all, are actually stricter than the laws in the US. The differences of the laws in Europe to the laws in the US have been somewhat of a surprise to many organisations who currently comply with the laws in the US and who don't necessarily realise that they now need to enhance their practices to comply with more stringent regimes.

大洋彼岸是何状况？

What's Been Happening Across the Pond?

美国的《反海外腐败法》（FCPA）于1977年12月19日颁布实施。FCPA将行贿外国官员的行为定性为犯罪，即便公职人员本身并不因接受贿赂而构成犯罪。FCPA要求各机构或组织落实相应的财务及内控措施，以防止和发现贿赂行为；但对更广义的反贿赂计划并未作出具体要求。不仅针对美国的机构或组织，FCPA还延伸至域外管辖，对使用任何一种美国商业手段（包括信件、电子邮件、传真、银行交易及类似行为）的任何其他机构或组织亦适用。

In the US, the Foreign Corrupt Practice Act (FCPA) came into force on 19 December 1977. The FCPA criminalises the paying or offering of a bribe to a foreign official, although the public official themselves do not commit an offence by receiving the bribe. The FCPA requires organisations to have accounting and other controls in place to prevent and detect bribery, but does not specifically require broader anti-bribery programmes. As well as US organisations, the FCPA has extraterritorial reach and catches any other organisation that uses any means of US commerce, including mails, emails, faxes, bank transactions, and similar acts.

顶级梯队：英国

Top of the Class: the UK

欧洲境内甚至其他地区的许多改变据说都是因英国2010年颁布的《反贿赂法案》引起，该法案于2011年7月1日起正式实施，被认为是世界上最严苛的反贿赂立法。

Much of the change in approach within Europe and indeed further afield has arguably been led by the introduction in the UK of the Bribery Act 2010 (Bribery Act), which came into force on 1 July 2011, and which is thought to be the strictest anti-bribery legislation in the world.

《反海外腐败法》（FCPA）和《反贿赂法案》的相似之处

SIMILARITIES BETWEEN THE FCPA AND THE BRIBERY ACT

管辖范围

Territorial Reach

《反贿赂法案》的管辖区域很广。其针对的不仅是英国境内的犯罪行为，而且还延伸至英国境外，只要是行为主体与英国有着密切联系。此等密切联系可以是英国公民或普通居民的身份，也可以是在英国境内设立的实体，甚至是一家苏格兰的合伙企业。对公司而言，《反贿赂法案》中的公司犯罪主体囊括了英国的机构与组织，以及在英国开展业务或部分业务的非英国机构及组织。例如，一家向英国出口的西班牙公司可能因其在西班牙境内的贿赂行为而成为公司犯罪的主体，即便该贿赂行为并未涉及任何与英国有关的人。

The Bribery Act has a wide territorial reach. It extends not only to offences committed in the UK but also to offences committed outside the UK where the person committing them has a close connection with the UK by virtue of them being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership. For corporations, the corporate offence in the Bribery Act extends to UK as well as non-UK organisations that carry on business or part of a business in the UK. So, for example, a Spanish company that exports to the UK can be in breach of the corporate offence for bribery occurring in Spain, even though that bribery does not involve any UK connected person.

处罚

Penalties

违反《反贿赂法案》将受严厉处罚。处罚措施包括无限额罚款、高达10年的监禁以及取消董事资格。公司可能被禁止参与公共采购项目，并且贿赂所得（例如通过腐败行为而获得的合同所生的利得）可能被没收。《反海外腐败法》的处罚力度有所不及，其规定的罚款金额以200万美元为上限（针对公司），对个人的监禁最长也不超过5年。

The penalties available for breaches of the Bribery Act are severe. They include an unlimited fine, up to 10 years in prison, and orders for directors to be disqualified. Companies can also be prohibited from public procurement and the proceeds from the bribe, for example the monies gained from a contract obtained through corruption, can be confiscated. Penalties under FCPA are slightly less severe with fines being capped to US\$2 million (for corporations) and imprisonment for individuals being limited to a maximum of five years.

《反海外腐败法》（FCPA）与《反贿赂法案》的不同之处

DIFFERENCES BETWEEN THE FCPA AND THE BRIBERY ACT

适用于一切形式的贿赂，甚至包括企业之间的贿赂！

All Bribes Are Caught, Even Business-to-Business!

《反贿赂法案》与《反海外腐败法》最重要的不同点在于：《反贿赂法案》禁止行贿受贿以及与外国公务人员有关的贿赂。因此与《反海外腐败法》不同的是，《反贿赂法案》还适用于私营领域（企业之间）的贿赂行为，不论行贿还是受贿均被定性为犯罪。因此，如果某个机构或组织在其董事和高管的同意或纵容下触犯该法，则此等董事和高管将被追究刑事责任。

Arguably the single most important difference between the Bribery Act and the FCPA is that the Bribery Act prohibits the offering or receiving of a bribe and the bribery of Foreign Public Officials. Unlike the FCPA, the Bribery Act therefore captures private (business to business) bribery and also makes it an offence to receive a bribe as well as pay/offer to pay one. Directors and senior managers can also be found guilty of an offence if their organisation commits one of these offences with their consent or connivance.

疏通费

Facilitation Payments

疏通费是指为加快或确保“例行公事行为”而支付的金额。《反海外腐败法》明确允许此类支付行为；而在英国，这样的行为却是《反贿赂法案》明令禁止的。

Facilitation Payments are payments made to expedite or secure the performance of a “routine government action”. The FCPA expressly authorises such payments. In the UK, such payments are prohibited under the Bribery Act.

公司的抗辩理由

The Corporate Defence

《反贿赂法案》还引入了一个公司未能防止贿赂行为时的抗辩理由，即：该机构或组织需表明其已落实旨在防范贿赂发生的“一系列充足程序”。据英国司法部制定的指引文件解释，所谓“一系列充足的程序”须遵循六大原则：顶级承诺；风险评估；比例原则；尽职调查；传达沟通（包括培训）以及监控和审查。如前所述，《反海外腐败法》仅仅是要求采取财务及其他控制措施防止和发现贿赂行为，并无更宽泛的要求。

The Bribery Act also introduces a corporate offence of failing to prevent a bribe being paid, for which it will be a defence for an organisation to show that it has “adequate procedures” in place to prevent such bribery. Guidance produced by the UK Ministry of Justice explains that these “adequate procedures” need to be guided by six principles: Top-level commitment; Risk assessment; Proportionate procedures; Due diligence; Communication (including training) and Monitoring and review. As stated above, FCPA only requires accounting and other controls to prevent and detect bribery, nothing broader.

其他欧盟成员国

Other EU Member States

多数已通过反贿赂法的欧盟国家都规定了严格的惩罚措施。不过，与英国的《反贿赂法案》相比，这些法律的适用范围一般更为有限，主要规范涉及公职人员的贿赂，但大多数至少与《反海外腐败法》一致。

Most EU Member States have enacted anti-bribery laws with heavy fines. When compared to the Bribery Act, however, such laws are generally more limited in scope and tend to focus on bribery of public officials. Most are however at least consistent with FCPA.

在法国，多数与企业相关的反腐败规定纳入了法国刑法典，这些规定涵盖公有部门和私有部门，既适用于行贿人，也适用于受贿人。与英国相似，法国的法律也具有域外适用效力，有趣的是还适用于其他情形，比如贿赂行为的受害人是法国国民的情形。违反法国法律的惩罚包括监禁（在某些情况下，最高15年的监禁）、罚金（对于企业而言，罚金最高是500万欧元，或者是违法所得的两倍）。与英国不同的是，法国并没有关于采取预防措施的法律规定。

In France, most of the French anti-corruption provisions relevant to businesses are laid down in the French Criminal Code and relate to both the public and private sector and both the offeror and the recipient. Like the UK, the law in France also has an extraterritorial reach and will interestingly apply amongst other situations, where the victim of the bribe is a French national. Penalties for breach of French laws include imprisonment for, in some cases, up to 15 years and financial penalties including, for companies, fines of, in some cases, up to €5 million or twice the amount of the proceeds stemming from the offence. Unlike the UK, there are in France, however, no legal requirements for implementing preventive procedures.

德国的反贿赂法包含在其刑法典中。该法禁止在境内或海外的交易中提供、支付或接受贿赂。另外，如果满足特定要求，则公司应就以其公司名义所实施的违法行为依据《行政违法行为法》（Administrative Offences Act）承担民事责任。所有权人/经理在特定情况下也可能承担责任。惩罚包括5年的监禁（如果是涉及某个公共机构的成员/官员的严重案件，则监禁期为10年）、罚金以及没收因贿赂所得的收益。刑法典也适用于海外的违法行为。在德国执行的重大案件之一就是西门子公司的案件。经调查，该公司为获得公共工程合同，在许多国家实施贿赂，因此向德国政府机构支付了近6亿欧元的罚款，这并不包括其因违反美国的《反海外腐败法》而在美国支付的罚款。

Germany's anti-bribery laws are contained in the Criminal Code, which prohibits offering, paying or accepting a bribe in domestic or foreign transactions. Separately, civil liability can, if certain criteria are met, attach to companies for offences committed on their behalf due to the Administrative Offences Act. Owners/managers can also be found liable in certain situations. Penalties include five years' imprisonment (10 years' imprisonment in severe cases involving a member/official of a public body), a criminal fine and confiscation of monies obtained from the bribe. The Criminal Code also applies to offences committed abroad. One of the key cases to be enforced in Germany was that against Siemens AG, who paid German authorities almost €600 million in fines after they were investigated for paying bribes to secure public-works contracts in a number of countries. This was in addition to fines paid in the US for breaching FCPA.

在荷兰，反腐败和贿赂法主要针对试图对公职人员实施贿赂的行为。与英国不同，荷兰法律的管辖范围相对有限。比如，一个非荷兰的外国公司，如果曾在荷兰境外向一个非荷兰的外国官员行贿，则该行为并不适用荷兰刑法。荷兰法律规定的最高惩罚是每个贿赂案罚款74万欧元，对个人而言，4年的监禁（私营性质的商业贿赂则为1年）以及最高74,000欧元的罚款。

In the Netherlands, anti-corruption and bribery laws are predominantly aimed at attempts to bribe public officials. Unlike the UK, Dutch law has relatively limited jurisdictional reach. For example, a foreign non-Dutch company that has committed acts of bribery of a non-Dutch foreign official outside the Netherlands is not subject to the criminal laws of the Netherlands. The maximum penalty under Dutch law is a fine of €740,000 for each case of bribery and for individuals, imprisonment for four years (one year for private commercial bribery) and a fine of up to €74,000.

展望 Outlook

尽管多数成员国近几年已经明显地改进了其反贿赂机制，但最大的障碍似乎是无法充分地予以执行，以及欧洲内部在执行层面存在的巨大差异，尤其是境外贿赂问题。依赖英国（或美国）将很快地耗尽各国能够动用的已经十分有限的人力物力，看来欧盟自身将在可预见的未来采取行动。当然，对于个人的刑事责任问题存在管辖权方面的顾虑，但欧盟委员会对卡特尔的宣战已表明其适合该执行工作。不过眼下的情况是，委员会在一份关于各成员国腐败问题的半年报中提出了若干问题质疑自己。

While most Member States have clearly improved their anti-bribery regimes in recent years, what seems to be the biggest hurdle is insufficient enforcement and the considerable differences in the enforcement levels across Europe, in particular when it comes to bribery abroad. Relying on the UK (or the US) will soon stretch the already limited resources that individual countries can bring to bear. It seems that the European Union itself will take action in the foreseeable future. Certainly there would be jurisdictional concerns as regards the criminal aspects for individuals, but the Commission's war on cartels has shown that it is well-suited to enforcing policy. Currently, however, the Commission contends itself with issues in a biannual report on corruption in each Member State.

鉴于上文提到的域外效力，欧洲的企业需确保他们遵守了所有不同国家的可能影响其业务的反贿赂法，这不仅包括他们本国的法律，还包括国外的法律。许多在国际和全球范围内运营的企业正在寻求遵守英国的《反贿赂法案》，因为遵守了英国的《反贿赂法案》，将足以确保其遵守了任何其他反贿赂立法。

Given the extra-territorial reach discussed above, European businesses need to make sure that they are compliant with all the different anti-bribery laws that could affect their business. This is not only the laws in their own countries, but also the laws abroad. Many organisations acting internationally and globally are seeking compliance with the Bribery Act as compliance with the Bribery Act should be sufficient to also achieve compliance with any other anti-bribery legislation.

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