

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 catching up and many EU Member States have already implemented anti-bribery laws more strict than those in the US. However, the lack of ratification, transposition, implementation and enforcement of international and EU norms poses one of the main barriers in the European fight against corruption. However, recent events have placed the topic back on the EU Commission agenda and we can expect further debate on the effectiveness and efficacy of enforcement in Europe.

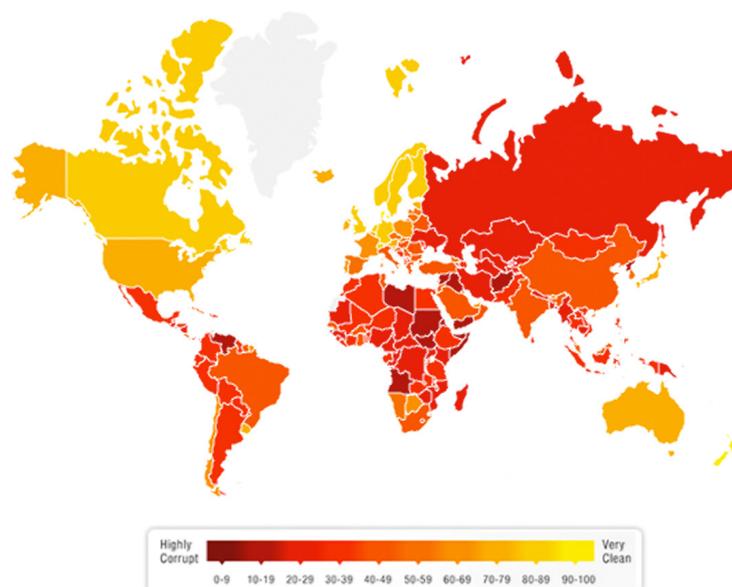
The levels of perceived corruption within the EU are generally quite good. Transparency International (TI) publishes an annual Corruption Perceptions Index which shows the perceived levels of corruption in 175 countries globally. In its 2016 report, the average score across the EU and Central Asia was 54.2 (with 0 being highly corrupt and 100 being very clean), much better than the global average of 42.94. Even those countries with the lowest scores in the EU, such as Greece, Romania and Italy, had an average score of 46.3, higher than the global average. Nine of the top 10 countries ranked as the least corrupt are actually in Europe (Denmark, Finland, Sweden, Norway, Switzerland, Netherlands and Luxembourg, Germany and the UK).

It should be noted, that over the last seven years, based on EU wide studies, many EU Member States have been overhauled their existing, in many cases insufficient, anti-bribery regimes and some Member States have implemented anti-bribery laws for the first



time. However, TI suggests that despite this, the region is now facing stagnation regarding the efforts towards corruption, and [reports](#) that even some of the highest ranking countries such as Denmark and the Netherlands, have been hit with bribery scandals and failures to report outside financial interests, particularly within government bodies. TI consider that this highlights an alarming systemic problem of corruption in Europe.

In the following we describe and compare some of the EU Member State regimes along with their differences and similarities. The majority, if not all, are actually stricter than the laws in the US. The differences between the laws in the EU and those in the US might be somewhat of a surprise to many organisations who currently comply with the laws in the US and who do not necessarily realise that they now need to enhance their practices to comply with more stringent regimes where they conduct business.



What's Been Happening Across the Pond?

In the US, the Foreign Corrupt Practice Act (FCPA) came into force on 19 December 1977. The FCPA criminalises the paying, offering or promising a bribe to a foreign official, in exchange for obtaining or retaining business, obtaining an improper business advantage, or directing business to another. The public officials themselves are not covered by the FCPA. The FCPA has a books and records and internal controls provision (more commonly referred to as the accounting provisions) which apply to publicly traded companies and non-US

companies whose ADRs trade on a US exchange. This part of the FCPA requires such organisations to have accounting and other internal controls in place to prevent and detect bribery and to accurately record and manage an organisation's assets consistent with management's directives. As well as US organisations, the FCPA has extraterritorial reach and can apply to organisations and their personnel who may use any means of interstate commerce, including mails, emails, faxes, and bank transactions to violate the FCPA.

Top of the Class: the UK

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. A number of investigations concluded in the past 18 months, have resulted in convictions of companies, or Deferred Prosecution Agreements (DPAs) being reached with regulators, demonstrating the focus and power that the Bribery Act's enforcers (the Serious Fraud Office), yield in the UK.

Similarities between the FCPA and the Bribery Act	Differences between the FCPA and the Bribery Act
<p>Territorial Reach</p> <p>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.</p> <p>Penalties</p> <p>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.</p>	<p>All Bribes Are Caught, Even Business-to-Business!</p> <p>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.</p> <p>Facilitation Payments</p> <p>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.</p> <p>The Corporate Defence</p> <p>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.</p>

Other EU Member States

Most EU Member States have enacted anti-bribery laws with heavy fines. When compared to the UK 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.

In France, most of the French anticorruption provisions relevant to businesses are laid down in the French Criminal Code and relate to both the public and private sector (B2B), both the offeror and the recipient, and both the corporation and executive management. Several important changes to an already comprehensive regulation were introduced in December 2016. Like the UK, the law in France also has a wide extraterritorial reach. 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. The law obliges certain companies to adopt a compliance program starting May 2017 but, unlike the UK, does not provide for a compliance defense (it does, however, sanction noncompliance with such programs). The recent changes also introduced a "*convention judiciaire d'intérêt public*" which can be considered as an equivalent of a deferred prosecution agreement as it exists in the US legal system, and increased the protection of whistleblowers.

[More information about the recent changes can be found here](#)

On 26 November 2015 the new German law against corruption (*Gesetz zur Bekämpfung der Korruption*) entered into force. It transposes both European legislation and the Criminal Law Convention on Corruption of the Council of Europe. The German legislator extended the scope of the existing anticorruption laws to cover EU officials and persons who are entrusted with fulfilling duties of the EU or its institutions. An entirely new criminal offence was introduced that criminalises active and passive corruption of foreign public officials. There are also changes to the territorial scope of anticorruption laws relating to offences committed in public office. In particular, the German Criminal Code now applies to offences committed by a German citizen abroad or by European public officials who have their office in Germany. As regards corruption in the private sector, the existing criminal provisions were extended to include cases in which corrupt practices lead (merely) to a violation of the duties of employees vis-à-vis their employers. Previously, corrupt behavior in the private sector was only punishable in cases which involved competitive distortions (i.e. "unfair preferences in the competitive purchase of goods or commercial services").

In the Netherlands, anticorruption 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.

Outlook

While most EU 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.

With an [anticorruption package](#), the EU Commission is pursuing a coherent approach for shaping EU policies on the fight against corruption. In addition to stronger monitoring and the proper implementation of existing legal instruments, the EU Commission foresees a wide range of EU-level actions to adequately tackle corruption. The Commission will propose revising the existing legal framework on confiscation of assets, which is a priority in the fight against organised crime, including in cases of corruption.

Given the extra-territorial reach discussed above, businesses seated in the EU 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 domestic acts, which should be sufficient to also achieve compliance with any other anti-bribery legislation.

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