

Coppers countering corruption

Exploring the impact of new UK Bribery Act on Ukrainian companies and foreign partners

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The UK Bribery Act that takes effect on July 1, 2011 is expected to have a significant effect on Ukrainian companies with business or banking connections in the United Kingdom. Its scope is similar to the US Foreign Corrupt Practices Act ("FCPA"), with three important expansions. First, accepting a bribe from or paying a bribe to any individual is prohibited, no matter where it occurs. A bribe paid to an employee of a private company, not just to foreign government officials and employees of international public corporations as under the FCPA, is illegal. Second, a company can be held strictly liable for bribery if the company fails to put in place procedures to prevent corruption. Third, potential fines are unlimited and possible prison sentences are longer.

What is illegal?

The UK Bribery Act 2010 makes it illegal to make or accept a bribe, under any circumstances, whether to a private individual or public official. The Bribery Act does not only apply to UK companies or companies listed on the London Stock Exchange. In fact, listing securities in London does not, by itself, subject a company to the Bribery Act. Rather, the Bribery Act applies to anyone who conducts business in the UK. Corporate acquisitions and establishment of joint ventures and consortia are particularly susceptible to violations of this ambitious statute as a company can be held liable for bribery committed by its partner or, in some cases, even for improper acts of an acquired company that occurred prior to the acquisition. The Bribery Act's far-reaching jurisdictional reach, along with the well-used and successful FCPA playbook, is shaping up to be a new strategy in the war against corruption.

Who is liable?

In order to comply fully with the Bribery Act, it is necessary to understand its meaning and applicability to companies involved in various projects around the world. If a company arranges financing, uses an agent, supplies or purchases goods or does any other part of its business in the United Kingdom, it is likely subject to, and must comply with, all of the provisions of the Bribery Act. However, merely visiting London to conduct business meetings or using London as a place to negotiate contracts is not enough by itself to subject a company to the statute. The Act applies to any bribe regardless of whether it took place in the UK. It is also important to note that, unlike the FCPA, the Bribery Act does not have an exception for facilitation payments, such as those used to speed up the process for obtaining a building permit or import license. Any facilitation payment will be a violation of the Bribery Act.

The burden of compliance

The new anti-bribery legislation puts a heavy burden on management and the board of directors to ensure company compliance. Once the Bribery Act comes into force, for instance, it will be a criminal offense if a company fails to prevent relevant acts of bribery. Failure to comply could expose individuals to prison sentences, while companies could be subject to unlimited fines. To make matters worse, under the new terms the UK's Serious Fraud Office, the government agency in charge of enforcing the Bribery Act, may hold companies strictly liable. The only defense available would be if the company could establish that it had in place "adequate" procedures aimed specifically at



bribery prevention.

Many companies, along with the attorneys who advise them, are struggling with the enormity of "strict liability" and wonder what specifically must be done to establish "adequate procedures" sufficient to prevent it from being imposed. Recent guidance by the UK Ministry of Justice tried to clarify that very question. There are a few clear action items that companies should take as soon as possible:

Step 1: Assess Risk

The first step in assessing risk is to determine whether a company falls within the Bribery Act's jurisdiction. Generally, the entirety of the Bribery Act applies to UK citizens, residents and incorporated entities, including trusts owning off-shore assets in Ukraine. Even if a company is not incorporated under British law, it should assess whether it conducts any part of its business in the UK and, if so, the Bribery Act's prohibitions will apply.

The next step is to assess the nature and extent of its exposure to the risk that bribery may be committed, directly by its employees or indirectly by third-parties acting on the corporation's behalf. A good place to start is to identify those countries where the company does business — for example, where is it located, where are its customers and where do the products used in production originate? Then, by simply using the same tools relied upon by government agencies tasked with enforcing these laws, such as the Transparency

International's Corruption Perceptions Index, a company can determine the level of risk associated with its entire global operation, which is essential in tailoring corporate compliance efforts where they are needed most.

A never-ending administrative obligation

Another key element of assessing risk can be found through a careful examination of a company's specific industry and the practices unique to it. Complex deals often involve government entities and officials, which increase the risk of corruption in many countries. The common practice of using local agents also increases risk, as does the giving or receiving of business gifts, entertaining and the covering of travel-related expenses of government officials. Guidance issued by the Ministry of Justice indicates that assessment of such risks must be periodic, informed and documented, overseen significantly by top management and appropriated adequate resources.

Step 2: Implement meaningful procedures

Once risks have been identified, a company must issue a meaningful global anti-corruption policy. Typically only a few pages in length, an anti-corruption policy describes the organization's tireless commitment to bribery prevention and delineates the very prohibitions, guidelines and limits that will mitigate risks and hopefully prevent bribery from occurring. Once finalized, the policy should be translated into all relevant languages and circulated widely to every employee, agent involved in business activities and sometimes even clients and customers. However, simply issuing a policy or paying it lip service is far from adequate and will assuredly expose a company to unnecessary risk.

Anti-corruption measures begin at the top

The companies that have been most successful in avoiding violations of the FCPA are those with a demonstrable and unshakeable top-level management commitment to anti-corruption initiatives. Employees and business partners alike must witness management's commitment to a zero-tolerance policy toward bribery. That commitment can be demonstrated in many ways, but most powerfully by turning away a potentially-lucrative business opportunity if it includes any act of impropriety. Management must assure that all employees understand that the company will never offer, pay, reimburse or condone a bribe. A company must also design and enforce effective, workable procedures that are proportional to its risk, such as performing thorough due diligence on customers and agents hired to assist with business activities. This can include retaining companies to conduct background checks, requiring business partners and agents to complete questionnaires designed to quickly uncover red-flags, and forcing business partners and agents to certify in writing that they will abide by the company's anti-corruption policy. Of course, companies will be expected to monitor the activities of these parties to ensure compliance.

Step 3: Training, training and more training

Finally, a company must institute strong and effective training on these values, policies and procedures. The UK government's guidance requires a

company to ensure that its bribery prevention policies and procedures are embedded and understood at all levels. This frequently includes live and on-line training sessions and periodic refreshers on core topics such as the ever-changing world of anti-corruption laws. The frequency, intensity and format of training will depend to a large degree on the company's risk profile.

Risks for foreign subsidiaries in Ukraine

The risk that a bribe will be offered or paid increases as a company expands into developing markets, as business ventures increase in size and scope and as a company cedes control to local entities or persons located thousands of miles from headquarters. Government tenders present a particular risk of corruption. Lavish entertainment, gifts or an advantage of any sort that is given to a government official — including employees of state-owned entities — for a specific business advantage will likely violate the Bribery Act or at least give rise to the appearance that it has been violated. Giving a job to a government official's relative could also be considered a bribe, as well as taking a government official and his family on a lavish vacation. In short, a bribe can be anything of value, tangible or not.

Local agents and legal liability

Often, local agents are retained to facilitate business overseas or dealings with foreign governments, and these third parties pose a specific and concrete corruption risk. Since local agents have historically led to the prosecution of many companies under the FCPA, a company must know its agents before retaining them and keep a careful watch on their activities afterward. With regard to joint ventures and consortia, the UK government guidance states that a joint venture partner will be liable for an act of bribery by the joint venture if the bribe was paid with the intention of "benefiting" that member. While the mere existence of a joint venture does not automatically trigger liability, partners must be aware that this possibility exists and take meaningful steps to guard against it.

With regard to acquisitions, due diligence is key. An acquiring company will often become liable for the past acts of the company it acquires. The risk of acquiring liability, however, can be substantially mitigated by a thorough pre-acquisition due diligence.

Expect rabid enforcement

While the FCPA has been on the books for 34 years, the first 25 years were relatively quiet, with only a handful of prosecutions each year. Nevertheless, to expect the same for the Bribery Act would be foolish. British prosecutors will speed through the learning curve normally associated with implementing new and complicated legislation, and are expected to follow the well-worn FCPA playbook from start to finish. Who can blame them? The United States has extracted more than USD 3 billion in the last three years alone from corporations that ran afoul of the FCPA, while establishing itself as a global leader in the war against corruption. Now the UK has a chance to take this war to a new level with no limits on the monetary fines that can be levied for violations and jail sentences up to 10 years for executives.

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