

Corruption: how to protect your company



The OECD Working Group on Bribery (“the Working Group”) reports on the results of their review of Switzerland’s implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions¹. Compared to the last evaluation, which had been performed in 2011, the Working Group noted, among others, specifically the significant level of enforcement by the Swiss Federal Office of the Attorney General (“OAG”) when it comes to prosecution of foreign bribery. It was noted that in such cases, the OAG increasingly prioritizes and encourages joint action with foreign law enforcement authorities, such as the US or Brazil. Furthermore, the Working Group highlighted the OAG’s active involvement in mutual legal assistance (“MLA”), where the Swiss enforcement authorities may also provide its counterparts abroad with gathered evidence during their investigations if this may support opening criminal proceedings or is useful in the light of an ongoing investigation.

On the other hand, the Working Group identified a number of weaknesses, for which specific recommendations were formulated. These recommendations are around the areas of protecting whistleblowers, imposed sanctions, publication of bribery cases and removing certain procedural obstacles as well as formalizing proactive MLA.

Consequences for Swiss companies or: Where is the catch?

The catch for Swiss companies is not necessarily lying in the recommendations issued by the Working Group, as one might think. Though most might agree that these points are crucial in order to further improve the fight against corruption, these recommendations have to be mainly addressed by the lawmaker. On the other hand, the catch for Swiss companies can be found in the positive points highlighted by the Working Group. The report clearly shows that the enforcement of laws against foreign bribery in Switzerland is getting stricter and stricter, the Swiss prosecutors talk regularly and share information with foreign law enforcement agencies. As a consequence, Swiss companies are exposed much more to prosecution and sanctions. Swiss companies have to keep in mind that Swiss law nowadays is similar to international rules and regulations with respect to foreign bribery such as the UK Bribery Act or the US Foreign Corrupt Practices Act. Article 102 of the Swiss Criminal Code states that a company can be penalized if it has failed to take all the reasonable organizational measures that are required in order to prevent an offence. Moreover, bribery is since 2016 punishable not only with respect to bribery of public officials, but also with respect to bribery of private persons, so a much broader scope. In a reversing cycle this means nothing else than

that companies can, if there is prosecution based on bribery, reduce or even eliminate a conviction and therefore also a potential fine, if they have taken all reasonably possible measures to prevent bribery. Let’s have a short look at what such measures could and should look like.

Measures to reduce bribery risk

Firstly, in order to reduce a company’s bribery risk, various internationally known frameworks can be used to implement or benchmark an anti-bribery, or even broader, a compliance management system. In the past, frameworks such as the Resource Guide to the US Foreign Corrupt Practices Act² or the guidance to the UK Bribery Act³ were widely used. Recently, we see a trend that the 2016 published ISO 37001 standard on anti-bribery management systems (“the Standard”) is used by companies to implement or assess their anti-bribery management system. The advantage of the Standard is that it covers both active and passive bribery, with the focus not only on organizations themselves, but also on their personnel, business associates and third parties (which, again, is nothing new and is presently a common and widely accepted practice), and, as it is an ISO standard, it is internationally recognized. The key elements to be addressed according to the Standard are:

- Management leadership, commitment and responsibility;
- Personnel training and controls;
- Risk assessments;
- Due diligence on projects and business associates;
- Financial, commercial and contractual controls;
- Reporting, monitoring, investigation and review; and
- Corrective actions and continual improvement.

Secondly, most regulators state that the measurements taken by a company have to be reasonable (i.e., they are not requiring a “best in class” approach). In other words, this means that the design of the anti-bribery or compliance management system should take into account the type, size and nature of the organization and the bribery risks it faces.

In practical terms, the following should be considered when implementing or assessing respective measures:

Risk assessment

The (corruption) risk assessment as well as the design of an anti-bribery management system should take into account the type, size and nature of the organization and the bribery risks it faces. Therefore the focus has to be on the company’s actual corruption risk based on the nature of the company’s operations (including geographical footprint), and the assessment should identify what policies and procedures are currently in place to mitigate corruption risks and where there is still a gap in order to reach a satisfactory level of compliance.

¹ <http://www.oecd.org/daf/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf>

² published by the US Department of Justice

³ released by the UK Ministry of Justice



Tone at the top

As role models, senior management and those charged with governance shall lead by example and with integrity. This is also applicable to lower management, demonstrating their commitment to compliance with ethical behavior, honesty and reliability in the day to day business.

Policies and procedures should be further adopted and approved by the company's senior management and, most importantly, enforced with zero-tolerance. The ethical values and principles shall be regularly communicated to the employees throughout the company.

Anti-corruption policies

Anti-corruption policies should be tailored to the corruption risk faced by the company. The policies normally address on how to remain compliant in specific high-risk areas, including bribing of (foreign) officials; private bribery; travel, entertainment and gifts; dealing with third-parties; charitable donations and sponsorships as well as political contributions.

Financial controls

Financial controls are an important tool in order to help reducing the risk of bribery. These controls normally are applied pertaining to cash accounts; transaction review; approval and accounting procedures and third-party approval of certain payments. In addition, a review of high-risk transactions (e.g related to high-risk countries/operations) is advised.

Training

Relevant compliance training should not only be given to employees in a sales function, but also to gate keepers such as accounting, financial, legal and internal audit employees.

The goal is not only for relevant employees being familiar with the company's compliance policies and procedures, but also for them being able to identify red flags, knowing how to report suspicious activities and last but not least, being aware that non-compliant behavior is not tolerated.

Monitoring

Any compliance or anti-bribery management system is only as good as its monitoring, as only monitoring can proof the effectiveness of the implemented policies and procedures as well as the awareness of them. A common practice for monitoring is to use the internal audit function for performing compliance and specific anti-corruption audits in order to identify potential violations as well as so far unidentified or emerging risks.

Monitoring, among others includes interviews of employees, reviews of relevant documents, transaction testing in high-risk areas and an analysis of the overall compliance program.

Third party risk management

Bribery risks posed by third parties (e.g. sales agents, distributors) should be adequately assessed and appropriately mitigated, as this is nowadays one of the most

significant, if not the biggest, risk in relation to bribery. Almost all large scale bribery cases in the last years have been a result of bribes paid not directly by companies, but more so by third parties engaged by them. For this reason it is advised that companies, which determine that their third parties pose an increased bribery risk, implement a thorough and robust third-party management system. This includes, among others, due diligence, compliance training, anti-corruption contract requirements and warranties as well as monitoring/auditing. The detail, depth and frequency of the afore mentioned measures is dependent on the risks posed by a third party.

Reassess risks

Companies should perform periodic risk assessments in order to adapt the compliance program in general, including

the anti-bribery management system, to a changing business environment. The timeframe of the reassessment has to be determined by the company, and it depends on the dynamics of its business as well as past compliance issues or violations.

Conclusion

Looking at the findings of the Working Group's report on Switzerland it is time to act. Given the increased activities by Swiss law enforcement authorities and the execution of MLAs, Switzerland is no longer a safe haven for companies that are exposed to bribery risk. Companies are therefore well advised to assess the robustness of their existing anti-bribery management system, or, if there is none in place, to implement such as soon as possible.



Philippe Fleury

Financial Services, Regulatory & Compliance
pfleury@kpmg.com



Marvin Schilling

Anti-Bribery & Corruption Forensic
marvinschilling@kpmg.com

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