Dear clients and business friends,

In today's environment, if a company fails to pay sufficient attention to the issues of bribery and kickbacks, it runs the risk of coming into conflict with the law sooner or later. This was the painful lesson learned by the Swiss subsidiary of a foreign-based group of companies, which in 2011 was indicted and sentenced by the Swiss Federal Prosecutor's Office to pay a fine and compensation in the single and double-digit millions respectively because it had failed to implement all necessary and reasonable organisational precautions in order to prevent kickbacks being paid to foreign officials.

In addition to the Swiss legal provisions on corruption set out in Art. 322ter of the Criminal Code (bribery of Swiss or foreign public officials, granting of an advantage), as well as Art. 4a of the Federal Unfair Competition Act (private sector bribery), internationally active companies are also required to comply with the far-reaching and extraterritorially applicable anticorruption laws of Great Britain and the USA.

In light of Great Britain's UK Bribery Act 2010, this issue of Legal News seeks to provide readers with an overview of a number of corruption-related risks as well as showing possible approaches to preventing corruption.

Daniel Bachmann
Attorney-at-law, Partner, Legal Services
daniel.bachmann@ch.ey.com

1. The UK Bribery Act 2010

In addition to offering and accepting bribes in both the public and private sector, the UK Bribery Act 2010 also makes bribing foreign officials and making payments in order to smooth the way for a desired business transaction (so-called facilitating payments) punishable. In doing so, the British legislator goes even further than the strict U.S. Foreign Corrupt Practices Act (“FCPA”), which confines the ban on bribery to the public sector and even allows facilitating payments within narrowly defined limits. In addition to legal entities and partnerships having their registered headquarters in Great Britain, the scope of application of the UK Bribery Act 2010 also extends to foreign companies which demonstrably carry on a business or part of a business in the United Kingdom.

In addition, pursuant to the UK Bribery Act 2010, any company shall be fined where a person associated with it is found guilty of bribery, regardless of in which country the act in question was performed. In this context, the term associated person is interpreted very broadly to include any person who acts for or on behalf of the company, such as e.g. employees and subsidiaries. In such a situation, the company in question may only escape liability by proving that adequate anticorruption procedures and mechanisms were in place.

In this way, the UK bribery laws could, for instance, also apply to a company domiciled in Switzerland which is commercially active in Great Britain through a subsidiary or branch office and where a person associated with said company bribes an employee of a business partner or public official anywhere abroad in order to secure a contract.

2. Scope of Application

2.1 Subsidiaries

According to the Guidance document of the British Ministry of Justice to the UK Bribery Act 2010, the mere fact that a company is listed on the London Stock Exchange or has a UK subsidiary is not in itself sufficient to qualify the company as demonstrably carrying on a business in the UK and thereby making it subject to the Act.

Nor is the fact that a parent company owns an equity stake in its subsidiary enough to make it liable for the corrupt practices of said subsidiary or its employees. However, where it is possible to demonstrate that the subsidiary or its employees have acted in a corrupt manner in their capacity as associated person and for the benefit of the parent company, it is also possible that the parent company shall find itself liable if it is unable to demonstrate that sufficient anticorruption procedures and mechanisms were in place.

2.2 Joint Venture

In the case of contract joint ventures, the liability of one contract partner for any corrupt acts of the other will depend on

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Dr. iur. Michael W. Faske, Attorney-at-law, Fraud Investigation & Dispute Services / Corporate Compliance Services, michael.faske@ch.ey.com
Markus Meer, Attorney-at-law, Legal Services, markus.meer@ch.ey.com
the influence it is able to exercise over the latter. In any event, any actions of an associated person of one contract partner will only be attributed to the other partner where the associated person in question demonstrably acted for the joint venture.

For joint venture companies, the same rule also applies as it does with subsidiaries, that corrupt actions of the joint venture company will only be attributed to the participating companies if such actions were performed for their benefit. The participating companies are not held liable for corrupt actions of associated persons of the joint venture company solely by virtue of the fact that they own an equity stake in the company.

2.3 Contract Partner

Even contract partners from companies may fall within the definition of associated person and any corrupt actions perpetrated by them may be attributed to the company accordingly. This is for instance the case where the contract partner acts in the name and on behalf of the company in any capacity that goes beyond mere delivery of goods.

3. Preventing corruption

In its Guidance document to the UK Bribery Act 2010, the UK Ministry of Justice recommends that companies, when establishing and implementing their bribery prevention procedures and measures, be informed by the following six principles:

- Proportionate compliance guidelines and measures
- Commitment of top-level management
- Risk assessment
- Verification of associated persons (due diligence)
- Communication and training
- Monitoring and review

A situational application of these six principles by a company not only allows it to substantially minimize the risk of being involved in corruption, but also creates the means for it to exculpate itself under the UK Bribery Act 2010 in the event of corrupt actions being perpetrated by persons associated with it. With regard to verifying an associated person (due diligence), the Guidance document states that the intensity of such an examination should always be in proportion to the risks which arise in connection with the relationship with the associated person in question. Whereas low-risk relationships will require only minimal verification, more serious risks may require direct questioning, investigations and background research on associated persons, as well as constant monitoring. Examples of more serious risks identified by the Guidance document include any statutory requirement to work together with local agents abroad, as well as corporate mergers and acquisitions.

Both in the case of joint ventures as well as for suppliers, it makes sense to incorporate compliance provisions and corresponding binding obligations into contractual agreements with supply chain partners. Finally, adequate compliance guidelines that are regularly explained, monitored and reviewed can minimize the risks of corruption arising in connection with associated persons such as employees and subsidiaries.

4. Conclusions

In its press release regarding the corruption case mentioned in the introduction, the Swiss Federal Prosecutor’s Office noted that, although the indicted company essentially had a functioning compliance framework in place at the time the acts under investigation were committed, it nevertheless failed to rigorously enforce it. This ruling and the extraterritorial application of the strict provisions contained in the UK Bribery Act 2010 (as well as the largely comparable rules of the FCPA), make it clear that the implementation of compliance guidelines is by far no longer enough to ensure the effective prevention of corruption. More important is that the actions of the company, of its subsidiaries as well as of current and future contract or business partners are examined and reviewed regularly. Regular communication regarding anticorruption rules and corresponding training for all affected associated persons also represent central tenants of a functioning corruption prevention strategy.