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Lex Mundi and
ACC's International Legal Affairs Committee present:

**Foreign Anti-Corruption Enforcement:
How Recent OECD Developments Affect
Your Risk & Compliance Obligations**

Moderator

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Key Factors of OECD Convention

Basic ideas:

- Fighting corruption more efficient with sanctions on paying side
⇒ only active bribery punishable
- Aim: equal business opportunities by level playing field for all competitors
⇒ international business transactions
⇒ obtaining advantage over competitors
- Setting up minimum requirements for fighting of corruption to be implemented into national law

Key Factors of OECD Convention

- (Active) bribing of foreign public officials in international business transactions criminal offence
- Participation in and attempt to bribing foreign public officials criminal offence
- Liability of legal persons
- Seizure and confiscation of bribe or proceeds of briber or similar monetary sanctions
- Jurisdiction for offences committed abroad
- Mutual legal assistance and extradition
- Monitoring process

Key Factors of OECD Convention

- Framework of Application
 - international business transactions (vs. pure national cases)
 - cross-border transactions
 - consolidation of accounts and/or profits in group accounts sufficient?
 - obtain or retain business or other improper advantage
 - irrespective of whether there was a claim to advantage (e.g. best bidder)
 - even in cases of necessity
 - competition situation necessary?

Key Factors of OECD Convention

- Foreign public official
 - person holding judicial, administrative or legislative office
 - person exercising a public function, including for a public agency or public enterprise
 - public enterprise:
 - dominant influence of government, directly or indirectly
 - performing public function (vs. operation in normal commercial basis like private companies)
 - official or agent of public international organization
 - autonomous qualification of foreign public official

Key Factors of OECD Convention

- Bribery
 - offer, promise or give
 - undue pecuniary or other advantage
 - directly or through intermediaries
 - to a foreign public official or a third party
 - in order that official act or refrain from acting in relation to performance of official duties
 - facilitation payments not prohibited under Convention

Key Factors of OECD Convention

- Jurisdiction
 - all acts or part of acts committed on signatory country's territory
 - ⇒ preparatory acts or consent to bribe sufficient
 - all conduct abroad of signatory country's nationals

Key Factors of OECD Convention

- Accounting Provisions prohibiting
 - off-the-book accounts
 - making off-the-book or inadequately identified transactions
 - recording of non-existent expenditures
 - incorrect identification of liabilities
 - using false documents

Key Factors of OECD Convention

- Status of Ratification
 - signed by 38 countries (31 OECD member countries and Argentina, Brazil, Bulgaria, Estonia, Israel, Slovenia, South Africa)
 - in all countries implemented into national law
 - however, not all countries have implemented all provisions of Convention

The FCPA May Differ From Other OECD Anti-Corruption Laws

Consider:

- statute of limitations
- definitions of key terms (e.g., public official, SOE)
- intent requirements
- successor liability
- conduct addressed (e.g., facilitating payments, private sector bribery)
- available penalties
- extent of enforcement and resolution mechanisms

Key Takeaway: Take into account the laws in each jurisdiction in which you conduct business

First Poll Question

Is your firm currently working on enhancements to its anti-bribery/
anti-corruption program?

Recent Developments in Turkey

- Offering or promising a bribe to foreign public officials is a criminal offence (Art. 252 (5) Penal Code)
- waiver of release from prosecution in cases of self-disclosure (Law 5918)
- administrative fine for companies in cases of bribery between 10,000 and 2 million Turkish Lira (6,400 – 1,3 million USD) [in certain constellations only]
- bribes no longer tax deductible

Recent Developments in Germany

- criminal law provisions against bribery of
 - domestic and foreign public officials
 - employees and agents in the private sector
 - members of domestic and foreign legislative assemblies
 - members of work councils
- administrative fine (up to 1 million Euro) against companies and/or managers if
 - bribes were paid on behalf of or for benefit of company
 - lack of or insufficient compliance programmes

Recent Developments in Germany

- Subject to forfeiture in cases of bribery is
 - direct and indirect profits and advantages (5th Senat BGH)
 - everything gained by unlawful agreement (=turn-over)
(1st Senat BGH)
- paying a bribe always breach of trust (§ 266 Criminal Code)
 - ⇒ bribe always damage to company
 - ⇒ personal civil liability

Recent Developments in UK

New UK Bribery Act

- 1) Extra-territorial application
- 2) Strict criminal liability for companies that negligently fail to prevent their employees or agents from engaging in bribery. Affirmative Defense: “adequate procedures”
- 3) Prohibits bribery of private citizens, as well as government officials
- 4) No exception for “facilitation payments”
- 5) Imprisonment for up to 10 years per violation

**Key Takeaway: Conduct that is Lawful under FCPA
Can Be Criminal Under UK Act**

Recent Developments in Ukraine

- Entry into force of laws “On Combatting Corruption” and “On Liability of Legal Entities for Corrupt Actions” postponed until 1 January 2011
- increasing punishment in cases of corruption
- introduction of criminal law provisions against bribery in the private sector
- sanctions against companies (fines, dissolution)

Bribery in the Private Sector

- Many countries have criminal law provisions against bribery in B2B relations
- B2B bribery often punishable under other instruments (e.g. fraud, consumer fraud, breach of trust)
- distinguishing between legitimate sales promotion activities and B2B bribery often difficult

Bribery in the Private Sector

- Types of B2B bribery offences
 - agent-principal approach
 - fair trade practices approach
 - combination of both approaches
- Scope of criminal conduct differs
- need to be aware of different approaches in each jurisdiction

Bribery in the Private Sector

- Agent-Principal Approach
 - relation between agent and principal (employer and employee) protected
 - bribe as a reward for violation of duties vis-à-vis principal
 - generally principal will incur damage
 - consent of principal generally precludes criminal punishment

Bribery in the Private Sector

- Fair Trade Practices Approach
 - purpose is to ensure free and fair trade opportunities
 - protection of competitors
 - bribe as a reward for preferring granting party against competitors
 - consent of principal irrelevant

Bribery in the Private Sector

- Consequences for Compliance Programmes
 - huge differences from country to country
 - same business activity can be lawful in one country and illegal in another one
 - broad understanding of who is an „agent“
 - transparency and consent of principal do not always help
 - distinguishing lawful promotion from illegal bribing often difficult

Trading in Influence

- trading in influence vs. lobbying
- obtaining reward for influenceing or promising to influence public official to act in the other party's favour
- in some jurisdictions criminal offence (e.g. France)

Books and Accounting & Tax

- Books and Accounting
 - prohibition of slush funds and off-the-books accounts
 - proper recording of transactions
 - correct identification of liabilities
 - violation and sanctions
 - criminal or administrative offence
 - in practice: sanction only in case of material incorrect financial statements

Books and Accounting & Tax

- Auditing
 - obligation of auditors to report (alleged) bribe to corporate bodies
 - auditing of compliance management systems as part of financial audit

Books and Accounting & Tax

- Tax
 - bribe payments in most countries not tax-deductible
 - disguising bribes will lead to criminal offence of tax evasion/tax fraud
 - bribes/provisions/commissions come into focus of tax audits
 - non-deductability of unclear expenditures

Second Poll Question

Has your firm combined its anti-bribery/anti-corruption program with other initiatives? (eg, anti-fraud?)

Compliance and Enforcement

- Domestic and International Tendencies
 - lack of and/or insufficient compliance procedures can trigger heavy sanctions
 - in some countries: lack of supervision and control punishable like bribery (e.g. Hungary)
 - personal criminal and civil liability of top management even if not personally involved

Key Components of an Anti-Corruption Programme (1)



Key Components of an Anti-Corruption Programme (2)

- “Tone at the Top”
- Assignment of roles & responsibilities
- Strong cross-departmental collaboration
- No “one size fits all”

Useful Tools for Anti-Bribery

- Transparency International Self-Evaluation Tool
<http://www.transparency.org/content/download/44214/708959>
- OECD Recommendations 29 November 2009
<http://www.oecd.org/dataoecd/11/40/44176910.pdf>
- Typology on the role of intermediaries
<http://www.oecd.org/dataoecd/40/17/43879503.pdf>
- Good Practice Guidance on Internal Controls, Ethics and Compliance
<http://www.oecd.org/dataoecd/5/51/44884389.pdf#>
- TI Reporting Guideline on UN Global Compact
http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf

Useful Tools for Anti-Bribery

- Guidance Document for Countering Bribery
http://www.transparency.org/global_priorities/private_sector/business_principles/guidance_document
- OECD Tax Awareness Handbook
<http://www.oecd.org/dataoecd/20/20/37131825.pdf>
- Lex Mundi's Best Practices in Preventing Fraud and Corruption in a Global Business
http://www.lexmundi.com/lexmundi/Best_Practices_in_Preventing_Fraud_and_Corruption.asp?SnID=2036551672

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