COMPLYING WITH BRIBERY LAWS in key European jurisdictions

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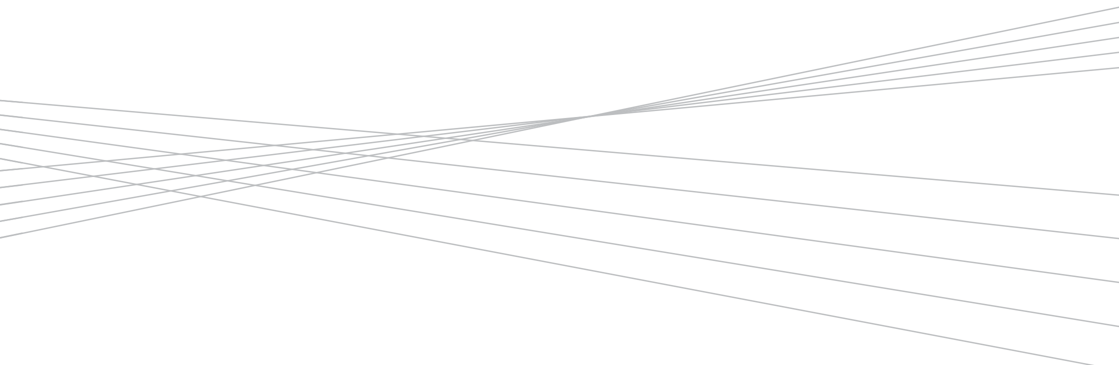

Complying with bribery laws in key European jurisdictions

This note is designed to provide our corporate clients with a brief overview of some of the key features of the laws against bribery in the home states of the contributing firms: France, Germany, Italy, Spain, the Netherlands and the United Kingdom (together, the "Six States"; individually, a "State") and some practical guidance on the use of a single set of procedures which might be designed to prevent bribery so as to avoid or mitigate liability in each of them.

It also considers some particular issues in M&A transactions. It is necessarily a high level summary and should not be regarded as legal advice. If you need further advice on bribery law compliance, please speak to your usual contact at the relevant Firm or one of the authors whose contact details are given below.

Introduction

Having come into force in 2011, the UK's new Bribery Act has received much recent attention. However, wherever they are based, corporates with cross-border operations, or which make cross-border investments, are subject to the laws of multiple jurisdictions. It is therefore important, when a corporate is designing its bribery compliance policies and procedures, that it addresses the requirements of all relevant jurisdictions.

Each of the Six States criminalises bribery which occurs inside and, to a greater or lesser extent, outside its borders and there is much common ground in relation to the responsibilities of corporates to prevent bribery on their behalf. By applying a "highest common factor" approach to its operations in the Six States, an international group should therefore be able to ensure that its compliance programme is designed to meet the separate requirements of each of them.

The Legal background in the Six States

Basic offences

Although the laws use different terminology, the basic concept of a bribe is common to each of the Six States[1]: a benefit, or something of value, given to someone to affect their behaviour for the benefit of the offender or someone he represents or favours. All Six States also expressly (or effectively) treat rewarding improper conduct after the event as bribery.[2] The bribery of domestic or foreign public officials is also an offence in each of the Six States.[3]

Three of the Six States take a different approach to the bribery of people who are not public officials (i.e. outside the public sector). In Italy, in the private sector, only certain key corporate

[1] The mere attempt to corrupt a public official is a separate offence in France irrespective of whether Bribery actually occurs. Similarly, in Italy incitement to commit bribery is a separate offence. In the other Six States, activities which fall short of offering a bribe might also be prosecuted as conspiracy to bribe or attempted bribery

[2] Under Spanish law the offering or giving of a gift or other reward to a public official merely on account of that official's position or duties is an offence, so ex-post-facto rewards are likely to be caught on this basis. Each of the other Six States expressly treat rewarding improper conduct as bribery

[3] In Germany, the threshold in relation to domestic officials is even lower than it is in relation to other bribery, as German law prohibits the offer, promise, grant or acceptance of any advantage for the mere (lawful) performance of the official's duties. In the Netherlands, the same applies to the bribery of both domestic and foreign officials. The Spanish ban on rewarding officials on account of their office would also catch such activities. The underlying rationale in each case is to prevent the "feeding" or "grooming" of public officials who may, as a result, become susceptible to improper influence. For similar reasons, the UK sets a lower threshold for foreign public officials in respect of whom an act may amount to bribery if it influences the foreign public official even if it does not influence the official to behave improperly

officers[4] face criminal liability for bribery; and then only if their actions are against the interests of their company. Spain criminalises private sector bribery if it infringes the relevant person's obligations in the acquisition or sale of goods or the hiring of professional services. In the Netherlands, private sector bribery is criminalised if the bribed person conceals his gift or promise from his employer in breach of the requirement to act in good faith.

Otherwise, the laws of the Six States broadly criminalise bribery of public officials (or their acceptance of bribes) at home or abroad and the giving or acceptance of bribes in private commerce; although they take slightly different approaches to so-called "facilitation payments".[5]

These are straightforward bribery in France and the UK, whether they occur in the public or private sector, at home or abroad (as they are in Italy if they occur in the public sector). In the UK the Serious Fraud Office ("SFO") has, however, issued guidelines suggesting that it may not prosecute where small payments are unavoidable and are not endemic, particularly if they are self-reported. In Germany, where, similarly, "facilitation payments" are not a recognised legal concept, there is generally no exception for "facilitation payments" from the criminal offences related to bribery, although the provisions are less restrictive in relation to overseas (non-German) public officials and with respect to small customary presents in the private sector not connected with specific behaviour. Like Germany, Spain does not recognise the concept of "facilitation payments". However, the Spanish courts have indicated that gifts which are "socially appropriate" (i.e. of low value and common practice in the relevant place or sector) are not to be regarded as criminal. In the Netherlands, Public Prosecutions Office Guidance provides that facilitation payments made to foreign public officials will not be prosecuted.

The definitions of "public official" vary between the Six States but all have a wide spectrum, generally presenting non-exclusive examples, extending to EU and other supra-national or international functionaries and key decision makers (such as judges). In each of the Six States the term may extend to executives of foreign nationalised industries.

Territorial scope

The laws of all Six States have some extra-territorial effect. All Six States criminalise the bribery of domestic officials (by anyone) and of foreign officials by their own nationals, or entities established in their territories, even if the bribery occurs overseas provided it is also illegal where it occurs. The UK and the Netherlands go further. In the UK, an act committed overseas which would be bribery at home, may be criminalised unless it is expressly permitted by local written law. Similarly, in the Netherlands, bribery of public officials by Dutch corporates or Dutch nationals is criminalised irrespective of whether it is illegal where the bribery occurs.

Italy subjects companies carrying on business within its borders to its worldwide jurisdiction where the bribery concerns public officials if some part of the improper conduct (including its mere conception and/or planning) has been carried out in Italy. Similarly, in the Netherlands some part of the improper conduct must occur within its borders. This contrasts with the position in the UK, where a corporate can incur liability on account of acts of bribery by associated persons outside the jurisdiction.

Accordingly, multinationals with operations in the UK will need to comply with UK standards in all their international dealings even where their conduct would not be unlawful in the place

[4] i.e.: directors, top managers, statutory auditors, liquidators and managers responsible for the financial reporting of the company

[5] Small payments made to a public or private official to induce or reward the performance of an official function which the individual is obliged to perform anyway (for example, to speed up the grant of customs clearance)

where it occurs. Those with operations in Italy will need to ensure that international activities which are managed or directed from, or otherwise involve, Italy meet the more prescriptive Italian requirements (discussed below).

Penalties

All Six States impose serious penalties on offenders. These include confiscation of the benefits of the bribery, substantial fines and prison terms. Some also provide additional penalties for corporates. In Germany, Italy, Spain and the UK, infringing corporates can be banned from public contracting. Other potential penalties include withdrawal of public subsidies or funding (Germany, Italy, Spain), disqualification from carrying on the business in which the bribery occurred (France, Italy, Spain), withdrawal of licences (Germany, Italy), court supervision (France, Italy) and liquidation (France, Italy, Spain).

Double jeopardy

Corporates which become embroiled in bribery cases may be subject to fines and penalties in multiple jurisdictions for the same conduct. While there is cross-border co-operation between investigating authorities and prosecuting authorities sometimes co-operate when setting penalties, the purpose of cross-border co-operation is not to reduce the burden on the corporate; taking a combined approach to penalties is not generally mandated and is not always endorsed by the courts.

Consequently, when bribery occurs, the damage to corporate groups with establishments and/or operations in numerous territories can be substantial in terms of management time taken up in concurrent overlapping investigations, proceedings and, in all likelihood, settlement negotiations in multiple jurisdictions and satisfying the appetites of several prosecuting authorities for fines which are each individually designed to act as a deterrent to the underlying behaviour.

Corporate liability for acts of officers, employees, agents and other representatives

Perhaps the greatest concern for corporate clients is that they potentially have criminal liability for the acts of their representatives – in some cases even where bribery is committed without the knowledge or approval of senior management.

The UK has, perhaps, the most onerous regime in this regard made all the more unpalatable by its lack of clarity. In the UK "relevant commercial organisations" ("RCO") (broadly, UK corporates and foreign corporates carrying on business in the UK) may have criminal liability for acts of bribery undertaken by "associated persons" to secure business or a business advantage for them. Anyone providing services to the RCO may be an "associated person" (this may include agents, distributors, advisers and consultants even where they are acting outside their authority from the principal); and there is a rebuttable presumption that employees are "associated" with their employer. There is scope for debate as to who is an "associated person" and what amounts to "carrying on business". The UK does not, however, attribute criminal liability to corporates for passive bribery offences of their "associated persons"; and proving that the corporate had "adequate procedures" is a complete defence to the corporate offence (see "*Procedural defences*" below).

Corporates may be liable for bribery in the Netherlands (or involving Dutch officials) and bribery abroad if the relevant conduct can reasonably be attributed to the corporate. This will typically be the case if it is committed "within the setting of the company" (for example, if the conduct is committed by an employee in the course of his or her duties or is part of the normal course of business operations or has benefitted the corporate). These criteria make it quite easy to attribute unlawful conduct to corporates under Dutch law. Consequently, Dutch

corporates which turn a blind eye to the risk of bribery by their agents or intermediaries or are negligent in failing to prevent it may face criminal liability.

In Germany, as a general rule, corporates are not subject to criminal liability. Only individuals acting on behalf of the corporate will be exposed to criminal penalties, such as imprisonment or monetary fines. However, German law provides for serious legal consequences resulting from administrative offences (a minor form of criminal act) applicable to corporates. For example, a German court may order the forfeiture of the proceeds of a corporate stemming from violations of anti-bribery provisions (as in the UK) or may order substantial administrative fines against the corporate as a result of unlawful acts, including bribery, committed by employees or agents acting on behalf of the corporate.

A Corporate operating in Spain and a Spanish corporate operating overseas may also be held liable for: (i) bribes offered or given in its name and for its benefit, or on its behalf, by its managers or legal or ostensible representatives; and (ii) bribes offered or given by its employees in the performance of its activities, on its behalf and for its benefit, if the employees were able to commit the bribery through a lack of due control. However, (unlike in the UK) the corporate can only be criminally liable if a crime is committed by an individual. By contrast, a corporate cannot be held criminally liable in Spain for the acts of another legal entity. This means, for instance, that a corporate cannot be held liable for criminal offences committed within one of its subsidiaries.

Italian corporates and corporates carrying on business in Italy may incur liability for bribery committed by their own top level management or by people under their supervision (even indirectly) in the "interests" or for the "advantage" of the corporate. This may include "associated persons" such as agents, distributors, contractors and others. The liability profile for Italian corporates and corporates carrying on business in Italy is therefore very similar to that for UK corporates and corporates carrying on business in the UK.

Similarly, under French law, corporates may be held responsible for acts of bribery committed for their benefit by employees or other representatives acting on their behalf even if those representatives are breaching corporate policy. However, French law does not criminalise the failure to prevent bribery.

Management liability

In Germany, members of management may incur personal liability for failing to take adequate supervisory measures and compliance officers may, under certain circumstances, be held liable under criminal and civil law for failure to act, if they do not prevent unlawful acts despite having been in a position to do so. In the Netherlands, any person in such a position who has knowledge of unlawful acts may also face criminal and civil liability; such a person need not be a member of the board or high ranking corporate officer. In Italy, recent case law has established that managing directors of an Italian corporate who fail to set up an effective "management and organisational model" aimed at preventing the commission of crimes (including bribery) may have civil liability to the corporate for breach of duty. While untested, similar civil liability might arise in the UK. In each of the other Six States, only officers with some actual or tacit involvement face personal liability.

Procedural defences

In each of the Six States which criminalises corporates for acts undertaken without their express authority by employees or representatives, there are steps which can be taken to reduce the risk of liability, mitigate its consequences or provide a defence in the event of prosecution ("procedural defences"). A UK corporate which can show that it has "adequate

procedures designed to prevent persons associated" with it from bribing is not liable for the corporate offence. The UK Ministry of Justice has published Guidance (as required by statute) on the procedures corporates might take to prevent bribery on their behalf. The Guidance is principles based, is not prescriptive and does not provide a safe harbour for corporates which follow it: the test of adequacy is always fact specific and will vary depending on the nature of the enterprise and its activities. However, the Guidance highlights key risk areas, and steps which corporates can take to reduce them, and provides a framework on which corporates can develop procedures which are capable of providing a robust defence.

In Italy, corporates have to adopt, and must effectively apply, certain "management and organisational models" to protect them from liability for bribery of foreign public officials. Guidelines published by leading employer's federation, Confindustria, have been approved by the Minister of Justice as providing a suitable model for corporates to adopt[6]. So long as these are effectively applied, they therefore offer robust protection from corporate liability. The procedures described in these Guidelines and in the UK Ministry of Justice Guidance are substantially similar.

Germany, Spain[7] and the Netherlands provide no specific procedural defences or guidance for corporates which may face liability for acts of bribery committed on their behalf. However, in each of these States corporates are nonetheless more likely to face liability if they fail to adopt procedures which are designed to prevent bribery. In Germany, the corporate offence is committed if the corporate has failed to take "supervisory measures" to prevent the act of bribery occurring (or if the bribery is committed by authorised agents or representatives). However, German law provides for a significant degree of discretion regarding the specific design and features of adequate "supervisory measures". Similarly, in Spain, corporates may incur liability where they fail to exercise "due control" to prevent bribery. Corporates which adopt "effective measures to prevent and unearth future crimes" after an offence has occurred may also benefit from a reduction in penalties. While neither Spain's legislature, nor its courts have given any guidance on the meaning of "effective measures" or "due control", like "adequate procedures" in the UK, showing that the corporate exercised "due control" is a complete defence where crimes are committed by employees[8]. The net effect is substantially similar to the position in Italy and the UK: a corporate which takes meaningful steps to prevent bribery may thereby avoid incurring penalties when employees, agents or other representatives commit acts of bribery in which the corporate is not complicit[9].

In the Netherlands, as noted above, unlawful conduct by employees and others is quite readily attributable to a corporate if it occurs "within the setting" of the corporate. Having adequate procedures in place may weigh in the determination of whether particular unlawful acts should be attributed to the corporate, especially where they are committed by agents or business partners.

6 Although not addressing bribery specifically, an important judgement in Italy also recently held that a management and organisational model based on Confindustria's Guidelines was a suitable approach to the prevention of crime

7 Save in the case of offences committed by employees

8 Although not expressly set out in the Spanish Criminal Code, legal academics argue that "due control" should also be a complete defence for a corporate where crimes are committed by its top managers

9 While in the UK, the Guidance has made it clear that the "adequacy" of anti-bribery procedures is a question of design and application, not outcome, there is some concern in Germany, Italy and Spain that endemic bribery incidents involving a number of individuals may be regarded as prima facie evidence that the corporate has failed to take the necessary steps to prevent it occurring

In each of the Six States, therefore, designing, implementing and maintaining a compliance management system is likely to go a considerable way towards reducing liability risks for corporates under their domestic laws.

Italian law imposes an additional requirement for corporates wishing to rely on the procedural defence. In order to avoid liability for bribery of foreign public officials, an Italian corporate or one doing business in Italy, must establish a permanent independent, autonomous body within the company (the so-called "*Organismo di Vigilanza*" or "Supervisory Body") which has real power to supervise and enforce the compliance model and a duty to suggest amendments to the model, when appropriate, to the managing body.

While this is a more codified approach than that of the other States, the need for effective senior management supervision and enforcement is a common feature. At a practical level, in order to implement the UK Guidance it is advisable to appoint a senior internal "enforcer"[10] with delegated board authority to oversee the design and implementation of a corporate's anti-bribery procedures. The day to day implementation of the procedures is often delegated to an internal compliance department. Similar approaches have developed in the other States. Where corporates are subject to both Italian jurisdiction and to the less codified requirements of one or more of the other States, this approach might be developed, in order to comply with the Italian requirements, by constituting the compliance department as a standing committee, with the senior "enforcer"[11] as its chairman.

A number of multinationals and other organisations publish details of their corruption controls and codes of ethics. In France, courts are likely to take such publications into account when evaluating how responsibly a corporate has behaved in its efforts to prevent bribery. In the UK the Ministry of Justice Guidance has highlighted such messaging as setting an appropriate "tone" from the top of the organisation and published anti-corruption and ethics policies are likely to be taken into account when assessing the "adequacy" of a corporate's procedures.

Some practical issues in M&A

Due diligence

The Guidance in both Italy and the UK is explicit about the need for corporates to do due diligence in order to protect themselves against liability for bribery by their associates or representatives. This is not limited to due diligence before acquisitions but includes background checks on new agents, business partners and senior executives and an on-going review of relevant information. In Italy, in particular, due diligence is a pillar of the anti-bribery compliance system and the law requires it to be carried out on a regular basis. While the UK is less prescriptive in its approach, "adequate procedures" are likely to involve broadly equivalent on-going monitoring and periodic checks.

The UK Guidance advocates a "proportionate", "risk based" approach, paying greater attention, for example, to counterparties or target entities in jurisdictions where the risks of bribery are perceived to be high and to sectors and business models which involve greater bribery risk (such as government contracting, major infrastructure projects and dealing through intermediaries).

The Italian Guidelines take a more prescriptive approach, requiring corporates to undertake due diligence based on identified "red flag" indicators. However, they identify substantially the same risk indicators as the UK Guidelines including: risky territories; uncommercial/offshore

[10] In the UK, this might be a board member or other member of senior management. In other States it might typically be the compliance officer

[11] in the Netherlands, this would typically be the *compliance officer*

payments; payments to third parties; intermediaries; government contracting/dealing with government officials; and infrastructure projects. Indeed, commentators on other jurisdictions produce similar lists of things which require particular vigilence and the areas they highlight are largely applied common sense. Following the Italian / UK Guidance to construct bribery due diligence procedures is likely to be as effective in the other States, which do not suggest or prescribe them.

In each of the Six States, even where there are no specific guidelines on due diligence (such as in France, Germany and Spain), the seller and buyer of an enterprise will wish to carry out due diligence as to whether the target enterprise is compliant. This is because the seller is likely to be required to give representations, warranties and indemnities in relation to compliance and the buyer may directly or indirectly suffer from, or, depending on the circumstances, become responsible for, relevant acts or omissions at the target enterprise.

In Spain, pre-acquisition criminal liability will be inherited on a true merger[12] but an acquiring company will not face liability from an acquisition of shares[13] as a parent company cannot incur liability for the criminal acts of its subsidiary. The subsidiary will, nonetheless face potential liability for criminal acts committed by its management or employees where it has failed to exercise "due control". Similarly, in the UK, a parent will not necessarily incur liability even for post completion acts of its subsidiary. The subsidiary may not be "associated" with its UK parent unless it provides services for, or on behalf of, the parent. However, where the subsidiary is established in the UK or carries on business there, it faces its own potential liability Dividends it pays to its parent may also be at risk of a civil recovery action.

How far do corporates need to go?

A pre-acquisition due diligence exercise which specifically addresses bribery risks serves a range of purposes: (i) undertaking the exercise may contribute to a procedural defence; (ii) due diligence findings may alert the buyer to future steps it needs to take to curb infringements by the target and avoid or mitigate possible liabilities; and (iii) unearthing significant issues (to which the buyer would be indirectly exposed on a corporate acquisition) may lead the buyer to restructure its acquisition, adjust the price, seek additional protections or withdraw from the transaction.

(i) Establishing defences for the buyer

In each of the Six States (other than France and Spain) it is clear that in order to avoid or mitigate potential liability for the continuing acts of acquired entities, corporates will be expected to conduct bribery specific due diligence at the time of acquisition and that this should go beyond the scope of normal financial or corporate due diligence[14]. In France and Spain, although the acquirer of a company cannot face criminal liability as a result of the acts of a "dirty" company it has acquired[15] due diligence is, nonetheless, as important as elsewhere to protect the buyer's investment and reputation.

[12] In Italy also, pre-transaction liability would be inherited on a merger

[13] Similarly in Spain, an acquiror of assets will not acquire criminal liability

[14] That is *not* to suggest that corporates in the Six States will always be liable for the wrongdoing of their subsidiaries. In the UK, a subsidiary is given as an example of a person which may be associated with its parent; however, there is no presumption and the associated person relationship depends on the actual provision of services by the subsidiary to, or for the benefit of, the parent. However, as this is a factual test which will be judged at the time a bribery incident occurs, save in exceptional cases it is likely to be prudent for most groups to implement procedures for all their subsidiaries, as circumstances may change over time

[15] other than on a merger, in the case of Spain

So what should buyers do? Clearly, the practical constraints of any acquisition will limit how far they can go. Seeking to delve too deeply into the target's affairs may be a major handicap in a competitive situation and direct due diligence may be unavailable, for example, in a hostile bid.

The answer in all of the Six States is that corporates should do what they reasonably can in the circumstances before the acquisition and (assuming it is judged safe to proceed) continue their due diligence afterwards[16]. If they have taken a sensible approach to the potential issues and take genuine steps to deal with issues once discovered, they can expect, at least, to mitigate their potential liability. In the UK the SFO has said publicly that it is keen to support "clean" companies acquiring "dirty" ones and cleaning them up. A new parent of a problem subsidiary can therefore expect a sympathetic reaction if its deals openly and cooperatively with the SFO. However, it will not necessarily avoid penalties or recovery being levied against the subsidiary itself in more serious cases.

Public due diligence

Even where no access to the target is available, background checks can be made on the basis of public information. A basic internet search may throw up media reports which cast light on the target's attitude to compliance, its history and its associates. It may be difficult to justify failing to make at least those background checks which are readily available to everyone. A number of organisations are also able to provide quite extensive information about entities and individuals in high risk jurisdictions (where reliable public information may be harder to come by) and their political connections and business interests. A local embassy or chamber of commerce should be able to provide information about the business environment in a particular territory and may have specific intelligence about a potential target or counterparty. There may be local court, or other registers which can also be searched where this seems appropriate.

Private due diligence

Even when access to the target is available, the sort of forensic investigation which may be necessary to unearth real evidence of wrongdoing is unlikely to be possible in the context of most M&A transactions. Even if it is, the cost of undertaking a forensic investigation (particularly where a group of companies is involved) is likely to be prohibitive. Most potential buyers are likely to have to limit their investigation to a review of key information and questioning key executives about procedures, the target's experience of bribery incidents and how it has dealt with them.

Due diligence questions are likely to include a request for details of the target's bribery compliance policy, its procedures documents, its compliance record and its history of external complaints and internal reporting (although for a large target, it may only be practicable to deal with a summary). Establishing that procedural defences apply will involve the production of evidence; this is likely to lead, increasingly, to corporates creating internal compliance paper trails, recording their periodic review of compliance policies and procedures, reasons for taking particular views or action, how issues have been dealt with and so on, which will then potentially be available for review by an acquirer. However, disclosure may be a sensitive issue.

Where a buyer is commissioning an accountants' report on the target, it may be appropriate to bring a high level bribery compliance review within its scope.

[16] The scope for sorting compliance problems out after the acquisition varies from State to State – see below

However, it should be emphasised that no amount of due diligence is necessarily going to unearth bribery or other criminal activity and when it does, potential buyers are left with a difficult decision: what to do with the information.

(ii) Dealing with due diligence findings

Actual or potential evidence of wrong-doing needs to be carefully handled. Preliminary conclusions of unlawful conduct may prove to be misplaced and the reputations, livelihoods and liberty of individuals may be at stake.

As a minimum, in order to rely on any procedural defence, a buyer would certainly need to take steps to prevent identified wrong-doing from continuing after the acquisition. This may not be as straightforward as it might appear. For example, if the local chief of police calls by periodically seeking a "gratuity" in order not to arrest and detain the target's entire work force on trumped-up charges, the only alternative to payment may be a substantial loss of production and ultimately the closure of the business.

There are, nonetheless, steps which can be taken in such situations. Without endorsing the making of facilitation payments, the UK Guidance lists a number of (perhaps obvious) responses, including pointing out that payment of the bribe would be a criminal offence, reporting the matter to a superior, the local government and/or local embassy, refusing to pay cash and asking for a receipt. However, circumstances will dictate whether any of these are practicable.

The SFO has also indicated that it is less likely to prosecute corporates in these situations than it would be if the payments were volunteered, particularly if the corporate notifies the SFO of the matter voluntarily (so-called "self-reporting") and it has a wide discretion to agree civil settlements (although the UK courts do not agree that this discretion extends to criminal plea-bargaining).

In the Netherlands the Public Prosecutions Office also has considerable discretion to decide whether a particular case merits prosecution and to agree settlements and may take such circumstances into consideration. However, it is unclear whether self-reporting avoids prosecution or results in meaningful leniency, so (as in other territories) the need for, or benefit of, self-reporting should be carefully assessed on a case-by-case basis.

In Italy, although corporates are not obliged to self-report, if a bribery offence is self-reported before the first instance hearing and if certain other conditions are met, the offender may be regarded as "non-dangerous" and thereby avoid the disqualification penalties noted above.

In Spain, corporates are not obliged to self-report when they discover internal wrongdoing, but a corporate that admits an offence to the authorities before it is aware that legal proceedings are being brought against it will benefit from a reduction in penalties. This is granted by the courts; it is not necessary to reach a settlement with the Public Prosecutor. Spanish law also requires a corporate to report criminal offences upon discovery (which might occur during due diligence) but the sanction for failing to do so is a derisory fine (less than one euro).

In Germany, there is no single prosecution agency comparable to the UK's SFO. Instead, throughout Germany there are local public prosecutors with different records and approaches to voluntary self-reporting, whose competency and jurisdiction depend on a number of factors, such as the registered seat of the corporate. As there is no general obligation to report a crime, in order to avoid potential damages claims being raised by the seller, a buyer may generally refrain from reporting any suspected incidents at the target company before the

acquisition has been closed. Rather, if practical under the circumstances, the buyer will insist that such incidents be reported before closing by the seller or the target company.

However, there is no certainty that self-reporting will avoid penalties altogether in any of these five States.

In France corporates cannot avoid or reduce penalties by self-reporting bribery.

While self-reporting of minor infringements, in particular in the UK, may enable corporates to agree a remediation plan and move on, this would not be a benign option for corporates which are subject to potential penalties for the same behaviour in other jurisdictions where prosecutors may take a less lenient approach. It will therefore be much more difficult for corporates in this position to proceed with a transaction and seek to deal with the problem afterwards.

Further, self-reporting to protect a corporate acquirer may involve exposing members of the target's management or its personnel (or indeed the seller and/or its management and/or personnel) to criminal sanctions. While corporates may be prepared to report internal bribery to the authorities and sacrifice implicated employees to fines and incarceration as a consequence (particularly where they are not members of senior management), where the executives of a seller are themselves implicated, this is unlikely to be an acceptable outcome for them; so they may withdraw from the deal or favour a bidder who is less scrupulous or is not subject to a comparable compliance regime.

Taking warranties or indemnities may not give the corporate acquirer adequate protection either, where it is exposed to liability for the acts of its newly acquired subsidiary[17]. Warranties may be qualified by disclosure and to the extent that a buyer is indemnified against penalties for its own criminal liability, the indemnity may be void on public policy grounds. However, indemnities may provide some protection against civil or administrative penalties or losses in the value of the buyer's investment.

Corporates which unearth actual or potential evidence of bribery in due diligence therefore need to take careful advice on the risks of proceeding and the advisability and efficacy of self-reporting or other potential protections or mitigating steps.

Changing the transaction terms

Even if a corporate acquirer which has identified infringing activity in a target is satisfied that it can quickly put a stop to it once it obtains control (or that the steps it plans to take are likely to be sufficient to mount a procedural defence if it fails), it may still inherit the risk of a bribery prosecution devaluing its new investment (and potentially damaging its own reputation). In some States self-reporting might be a viable way to deal with low level legacy issues without serious economic loss to the acquirer but this may be commercially unpalatable in serious cases and may create issues for the corporate acquirer in other jurisdictions.

In some cases, restructuring a company acquisition so as to acquire assets from the infringing entity rather than shares from its parent may provide some protection. In Italy, an acquirer of assets cannot be exposed to the additional disqualification penalties mentioned above and faces only half of the potential fines (which are shared by the seller)[18].

[17] This will not be the case in Spain as, in principle, the acquirer will not be exposed to liability for the acts of the newly acquired subsidiary

[18] In Spain as noted above, neither the acquisition of shares nor the acquisition of assets exposes the acquirer to criminal liability of its target, except in the context of a merger. Consequently, the only risk that the acquirer will face is the devaluation of its investment, if the acquired subsidiary faces penalties, and the potential damage to its own reputation

However, restructuring a deal may have other implications: it may not be as tax efficient for one or both parties; issues may arise with the transfer of key contracts and licences. In some jurisdictions (France, Germany, Italy, the UK) the authorities may still be entitled[19], in principle, to trace the acquired assets and confiscate them as representing the proceeds of crime (acquired with knowledge of the offence) if there is sufficient evidence that the assets can be attributed to criminal activity (including, but not limited to, bribery), although they are likely to seek recovery of the sale proceeds first from the actual wrong-doer. The UK's SFO has also announced that it plans to pursue investors who receive distributions from infringing companies if they have failed to do appropriate due diligence. Its technical basis for this assertion is debateable and the steps investors are expected to take is currently unclear.

In Germany, criminal courts have sometimes taken a holistic view and have disregarded (artificial) legal structures which had been implemented to prevent or reduce liability. Therefore, there is no certainty that restructuring a deal could effectively protect the acquirer from all German liability risks. Furthermore, a major transaction recently had to be unwound after its closing due to a series of bribery incidents at the target company. As a consequence, in Germany investors are often unwilling to take on exposure to any unresolved material compliance incidents at the target company and insist that any identified material incidents are fully cleaned up and remedied (with the involvement of public prosecution authorities if necessary) prior to the closing of the transaction.

Warranties

A detailed discussion of the appropriate level of warranty protection in each of the Six States is beyond the scope of this paper. However, as in other areas, bribery warranties need to be tailored to the particular circumstances.

An unqualified warranty that a company complies with bribery law or has adequate procedures, supervisory measures or controls may be difficult to give in all but the simplest of situations. More nuanced warranties addressing compliance history, the implementation of procedures, corporate knowledge of infringements and investigations and disclosure of corporate policies may be a more balanced approach. However, this will always be a matter for negotiation and a buyer in a strong bargaining position may take the position that any risk arising from past bribery (even the potential risk that incidents remain undiscovered) should be taken solely by the seller.

The collateral issues which arise from disclosure also need to be properly considered. Besides raising difficult judgements about self-reporting and direct risks for individuals, at a practical level, a seller which knows it has disclosures to make about criminal infringements would be well advised to deal with them in a separate process directly between principals. Information which is then passed on by the buyer to its lawyers should benefit from legal professional privilege. The same information provided to the buyer's lawyers directly by anyone else (including the seller, its lawyers, financial advisers or other agents or through a data room) is not privileged. In the UK, the recipient adviser is therefore obliged to make a report to the SFO under money laundering regulations. Making such reports can seriously impede the progress of a transaction, as clearance is then needed for the adviser to proceed and may not be forthcoming. The same applies in France as financial information which may indicate money laundering must be reported to a public body known as TRACFIN. Only information passing between a client and its lawyers will benefit from legal privilege. Similarly, in Germany and Spain, money laundering provisions may oblige a buyer or its lawyers to report crimes revealed in due diligence to the authorities.

[19] under money laundering regulations

Indemnities

A Buyer may seek an indemnity from a Seller for amounts which a target business has to pay as a consequence of bribery occurring prior to their acquisition. Whether this is appropriate will depend on the circumstances. Arguably it would be illogical to deal with bribery risk differently from any other pre-acquisition liability, particularly if no specific bribery or suspect facts have been identified. However, unlike other areas of potential liability, where bribery has occurred (or is endemic), it is likely to be concealed. This is also a reason to take particular care with claims limitations and time limits.

As noted above, contractual protections (including indemnities) may not be enforceable to the extent that they purport to protect the acquirer against its own criminal liability for on-going infringement. Thus, a buyer which relies on warranties or an indemnity to deal with the possibility that bribery which has not been identified continues after closing (leaving the buyer with potential vicarious liability) may find the remedy to be ineffective.

Transitional Services

Many private acquisitions will involve a buyer relying on services from the seller's group for at least an interim period. These may include, for example, shared IT systems, invoice or payroll processing, group purchasing, shared premises or utilities, legal, accounting or insurance and a range of other services.

A provider of such transitional services may be an "associated person", agent or representative of the buyer for certain purposes. Consequently, attention needs to be paid to bribery compliance and the potential risks of reliance on the seller's group when negotiating such arrangements.

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