



Challenges faced by Luxembourg companies relating to corruption prevention

by Gérard Zolt
Country Practice Leader – Fraud Investigations & Dispute Services (FIDS)

Reminder on corruption.

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What is corruption and why does it matter?

Corruption: Misuse of power by / for private gain.

➔ Corruption undermines the efficient allocation of resources therefore reduces economic development

➔ Corruption undermines fair competition:



- Contracts awarded to the best briber and not the best provider;
- Quality standards become less significant
- Prices artificially inflated
- ...

Corruption has become a major compliance risk for all companies:

- Increased globalization (through partnerships, acquisitions, etc.)
- Increased enforcement (global coordination of enforcement agencies)
- Corporate governance reforms (e.g. Dodd-Frank Act)
- Increased global focus on anti-corruption (e.g., US FCPA and UK Bribery Act)

Most common type of corruption is bribery:

- Cash, lavish gifts or entertainment
- Non-essential, lavish travel expenses
- Improper campaign contribution
- Scholarship, travel for family members
- Overpayment for services or under-pricing of assets
- ...

What is considered high risk?

- Operations in high risk countries with history and reputation for corruption.
- High levels of interactions with government officials (in areas of customs, licenses, permits, sales, etc.)
- Reliance on third parties (agents, intermediaries, etc.)
- ...

Risk associated with third-party intermediaries (agents, consultants, etc.):

In some countries and regions, business is conducted indirectly through agents and third parties:

- This practice or custom allows a company use the expertise of someone who is already knowledgeable of local specificities.
 - In addition, some countries (especially countries in the Middle East) require hiring of a local agent in order to perform services
- ➔ A common feature of many anti-corruption prosecutions is the use of local agents to pay bribes and conceal the payments.
- ➔ Anti-corruption prohibits both direct or indirect bribes including bribes paid through agents.

Some of the findings of the 2013 survey on corruption undertaken jointly by the Chamber of Commerce – Ernst & Young FIDS Luxembourg.

Some of the 2013 survey's findings

First ever survey in Luxembourg dedicated to corruption:

- 51% of respondents believe that corruption is an issue in the European Union.
- 31% of respondents believe that in the past they have lost a contract due to corrupt practices of their competitors.
- 67% of respondents have an anti-corruption policy BUT 51% have anti-corruption procedures.
- 15% of respondents believe that they or their company cannot be held responsible after an acquisition for corrupted practices that were undertaken before the acquisition.
- 30% of respondents have implemented a whistleblowing program accessible to their staff.
- 8% of respondents have in the past sanctioned staff members for breaches of the company's anti-corruption policy and procedures.
- 53% of respondents agree with the statement: « A strong position from our government on anti-corruption, combined with effective private sector initiatives to fight such corruption, is a very powerful signal for foreign investors and foreign companies to come to Luxembourg ».

The challenges facing Luxembourg companies as regards corruption.

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Feedback received during meetings / discussions and return of experience from FIDS assignments undertaken or on-going:

- Lack of awareness: there have not been sufficient cases made public in Luxembourg, as well as to a certain extent abroad, in order to fully comprehend the complexity of the issue.
- Luxembourg companies, with few exceptions, ignore the far-reaching effects of foreign laws on their day-to-day operations.
- Many companies consider that they cannot have the necessary internal infrastructure to handle this issue.
- The cost issue: “we cannot afford in these times of crisis to implement such measures”.
- Not always clearly defined who is in charge of handling this topic inside the company: internal audit, compliance department, legal, HR, ...
- Misplaced believe that the topic of corruption falls under the points covered by normal external audit mandates.
- Fear of being the “best pupil in the class” and therefore at a competitive disadvantage.
- Misplaced idea that effective prevention is limited to having an internal code of conduct and/or guidelines on accepting gifts.
- Misplaced idea that as they only do business in “civilized countries”, there is no corruption risk.
- Severe limitation on accessing the necessary expertise on these subjects.
- Limitation on recruitment possibilities in order to man the department handling this issue.
- No proactive support from government bodies on assisting companies.

What about the foreign laws of FCPA and
UKBA?

US Foreign Corruption Practices Act (FCPA) and UK Bribery Act (UKBA) provisions

FCPA	UKBA
<p><u>Anti-bribery provisions:</u></p> <ol style="list-style-type: none">1. Makes it a criminal offense for US companies or persons to “<i>corruptly</i> take action <i>in furtherance of</i> payment or a promise, offer or authorization of payment Of a bribe or <i>anything of value, directly or indirectly</i>, to a <i>non-US official in order to obtain or retain business or improper advantage</i>” <p>→ Applies theoretically to issuers, domestic concerns, persons in the US, BUT very recent cases in March 2013, confirmed by US courts, demonstrate that <u>foreign companies and/or persons without any link to the US can be charged under FCPA.</u></p> <ol style="list-style-type: none">2. <u>Recordkeeping and Internal control provisions</u> (applies only to SEC registrants)	<p><u>Overview of the Act:</u></p> <ul style="list-style-type: none">➤ Two general offences:<ul style="list-style-type: none">▪ Bribing another person or entity▪ Requesting/receiving a bribe➤ Bribery of foreign public official .➤ Failure to prevent bribery: the new strict liability corporate offence.➤ Associated persons – A person providing service on behalf of the company (employee, joint venture, subsidiary, third party provider) <p><u>Jurisdictional reach – extension of existing law:</u></p> <ul style="list-style-type: none">➤ British citizens (operating anywhere in the world) and individuals ordinarily UK resident➤ Corporate bodies incorporated in UK and/or who carry on business, or part of a business, in the UK.

US Foreign Corruption Practices Act (FCPA) and UK Bribery Act (UKBA) penalties

FCPA	UKBA
<p><u>FCPA violations – penalties (amounts in USD):</u></p> <p>→ Recordkeeping and Internal control violation excluded.</p> <p><i>For companies:</i></p> <ul style="list-style-type: none">• Criminal fines: up to 2.000.000 per violation.• Civil penalties: up to 10.000 per violation. <p><i>For individuals:</i></p> <ul style="list-style-type: none">• Criminal fines: up to 100.000 per violation.• Civil penalties: up to 10.000 per violation.• Imprisonment: up to 5 years. <p>In addition: Alternative Fines Act</p> <p><u>Collateral consequences of an FCPA violation:</u></p> <ul style="list-style-type: none">• Suspension from government contracting.• Limit on ability to receive U.S. export license.• Suspension or debarment from Overseas Private Investment Corporation and Commodity Futures Trading Commission programs.• Suspension from contracting with international bodies, such as the World Bank.• OFAC sanctions and penalties.• Reputational damage.	<p><u>Penalties for breaches:</u></p> <ul style="list-style-type: none">• 10 years in jail.• Unlimited corporate fine for ‘failure to prevent’ charge.• Reputation damage, debarment from EU contracts, costly monitor, distraction of management time, director exposure, potential competitor or shareholder action. <p><u>Enforcement:</u></p> <ul style="list-style-type: none">• From 1 July 2011 - 3 months after the Ministry of Justice and prosecutorial guidance was published.• Serious Fraud Office (SFO) IS taking the lead on enforcement but THE opinion of prosecutors is key.• Strong evidence of growing cooperation between UK and foreign authorities.• Self-reporting and plea bargaining are considered as highly important elements.• In cases of a potential corporate offence, the company can try an “adequate procedures” defense against the ‘failure to prevent’ charge.

Thank you.