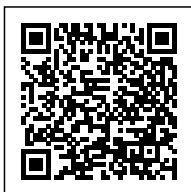


BRIBERY AND CORRUPTION DISRUPTION - OSBORNE CLARKE

Posted on 20/05/2013



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Understanding cross-border anti-corruption laws should be high on the corporate governance agenda

For local Spanish companies, the concept of corporate responsibility is sometimes less advanced than in other jurisdictions, says Silvia Steiner, a Partner at Osborne Clarke in Barcelona. Indeed, before the new Criminal Code came into force in December 2010, Spanish businesses could only be held civilly liable for the illicit conducts committed by their directors, officers or employees – the Code subsequently established corporate liability for criminal offences.

And while companies have been getting to grips with domestic regulations, the past years have also seen notable international legislation – especially the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA) – obliging businesses to adhere to strict anti-corruption practices wherever they operate in the world. What has escaped the notice of some organisations however, says Steiner, is that companies based in Barcelona or Madrid can be liable for breaches of UK and US law. “It is important for Spanish companies to remember that cross-border legislation, like the Bribery Act and the FCPA, do not just affect UK and US companies,” she explains. “For example, a Spanish

business that has a branch or a subsidiary in either country could be prosecuted under the FCPA or the Bribery Act for a wrong-doing that has occurred outside of the US or the UK, respectively." Steiner points out that the main illicit activities under the two acts are the bribing of foreign officials to obtain a business advantage and, in the case of the UK rules, also the bribing within the private sector. Put simply, a Spanish company with a UK presence that engages – either directly or through an agent of the company – in bribery with some corrupt officials in an African jurisdiction, or pays off a local supplier in a Latin American country, could be brought before the UK authorities. Additionally, a company can also be sanctioned under these two anti-corruption regulations for any deviation in the keeping of accurate books and records and adequate system of internal controls.

"It is easy for Spanish companies to look at the rules and assume it does not apply to them but that is not the case," Steiner says. "For example, out of the top 10 cases involving the US Government's enforcement of FCPA, only two have been American companies. Spanish companies need to know that having a presence in the US or even a secondary listing, such as a 144A offering, means they need to be aware of expectations."

In 2012, these include Germany-based Allianz, which paid over \$12.3m to the US Securities and Exchange Commission (SEC) to settle the charges over "violating the books and records and internal controls provisions of the FCPA for improper payments to Government Officials in Indonesia". Swiss outfit Tyco International paid \$26m after subsidiaries arranged illicit payments to foreign officials in more than a dozen countries, while Pfizer was charged over illegal payments made by its subsidiaries to foreign officials in Bulgaria, China, Croatia, Czech Republic, Italy, Kazakhstan, Russia, and Serbia to obtain regulatory approvals, sales, and increased prescriptions for its products. UK-based Smith & Nephew paid more than \$22m over its US and German subsidiaries bribing of public doctors in Greece to win business.

Systems in place

The crucial thing is for Spanish companies to improve their internal corporate governance processes with the assistance of legal counsel, says Steiner. Indeed, the US and UK legislation requires businesses to implement a clear internal structure for reporting, which can require extensive staff training and strategic plans to comply.

Steiner recommends that Spanish organisations look to implement, with the help of a specialised group of lawyers, a uniform set of standards that are in line with local and international requirements. "Programmes and protocols have to be put in place, but businesses need to establish a single set of standards that comply with the highest and strictest level of regulation, today the Bribery Act and FCPA requirements," says Steiner. "They need to ask what their businesses are and identify the risks. Each company is different, of course, so we tailor each solution accordingly."

Failure to undertake such a review could be devastating, she concludes. As seen with the FCPA, pursuit by the SEC can result in expensive payments and, in theory, companies could be faced with bans from public tendering, closure or even prison sentences for individual officers. Her message is to think local but act global.

Para las compañías españolas el concepto de responsabilidad corporativa está a menudo menos desarrollado que en otras jurisdicciones, dice Silvia Steiner de Osborne Clarke. Pero entender las fronteras de la normativa anticorrupción debe ser una prioridad de la dirección de cada empresa. El mensaje es pensar localmente pero actuar de manera global.