Steele

Navigating Compliance in EMEA Countries

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INTRODUCTION

The United States has always led the charge against foreign bribery and other forms of corporate misconduct and continues to lead the charge today.

Many nations are following the United States' lead, creating their own strong anti-bribery laws and ambitious enforcement regimes. In Europe, one country after another has modernized its anti-bribery posture in recent years to align at least roughly (if not precisely) with the U.S. Foreign Corrupt Practices Act. More European countries will follow, and the rest of the world will follow after that.

Corporate ethics and compliance officers at global corporations must now design their compliance programs to handle the implications of this shift. For example, companies will need to juggle parallel investigations as multiple countries coordinate their inquiries into the same misconduct. Risk assessments will need to encompass more risks. Policies and training will need to be sharper, and apply to more people of different backgrounds.

This paper explores the proliferation of anti-bribery laws, particularly in Europe; what role an effective compliance program can play in reducing liability when bribery allegations are at hand; and the capabilities that program will need to have, if the company wants to take full advantage of regulators' cooperation policies and reduce enforcement risk.

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ANTI-BRIBERY COMES TO EUROPE

It is essential for the acquiring company to accurately Europe's renewed attention to anti-bribery began with the U.K. Bribery Act, which went into effect in 2011. Germany updated its German Criminal Code in 2016 to include a new section prohibiting illicit payments to foreign government officials. The Netherlands has long had a ban against bribing government officials regardless of whether they are foreign and domestic, and has recently increased its participation in international enforcement actions.

Meanwhile, France adopted its Sapin II anti-bribery law in 2016, a sweeping expansion of what had previously been on the books. In November, French prosecutors took their first enforcement action under the law, imposing a deferred-prosecution agreement (and a €300 million fine) against a large bank to settle tax evasion charges.

Italy just adopted an expanded whistleblower protection law; the Kingdom of Saudi Arabia is considering a whistleblower protection law, as the crown prince has increased an anti-corruption push there. Ireland is scheduled to adopt a new anti-corruption law in 2018 that will impose strict liability on corporations whose employees engage in bribery, unless the company can demonstrate that it took reasonable measure to prevent the misconduct from happening—that is, unless the company undertakes some effort at compliance.

All these laws (and others) can trace their origins to the EU Convention Against Corruption, first promulgated in 1997. That convention directed all member states to adopt laws against corruption both *active* (offering a bribe to an official) and *passive* (accepting a bribe as part of one's official duties).

To list all the EMEA countries modernizing their anti-bribery enforcement would fill this paper. Compliance officers trying to structure an effective ethics & compliance function should focus on a few basic points that apply to them all.

- **EXTRATERRITORIAL REACH.** These laws apply to the country's nationals wherever they may work; and to any company doing business within the country's borders. Like the FCPA, EMEA anti-bribery laws can often sweep up companies that might assume they have no regulatory risk there.
- **CORPORATE LIABILITY.** The laws impose liability on a company for the corrupt actions an employee (or a third-party) commits on its behalf.
- **COMPLIANCE PROGRAMS.** Sapin II, the Bribery Act, Germany's Criminal Code, Ireland's forthcoming statute: all these laws either require a company to maintain some type of compliance program, or offer reduced penalties if a company does have one.

Global organizations have two principal challenges here. First, even though all the anti-bribery laws have common elements, they still exist within each country's separate political and legal frameworks. For example, attorney-client privilege may differ among European Union member countries and the United States; this will complicate decisions about how to investigate cases. Employee privacy protections are higher in Germany and France than other EMEA countries; a global compliance program, or even just an EMEA-wide one, will need to accommodate such practicalities.

Second, all these laws will require global and local leaders to spend more time talking about the importance of compliance and good conduct—that is, investing in tone at the top. For example, Italy's new whistleblower protection law may not carry much weight with U.S. companies; Italy is not a significant trading partner, accounting for only $16.7 billion in exports in 2016 against a total U.S. economy somewhere north of $18 trillion.

Within Italy, however, the new whistleblower protection law is a major advance in anti-corruption. If a company wants to avoid liability for claims of retaliation, it will need to spend time telling Italian employees that whistleblower protection is a subject the firm takes seriously. Winning the hearts and minds of EMEA employees, third parties, and the public will be an ongoing task for quite some time.

THE RISING TIDE OF RISK

For corporations working in EMEA, the proliferation of anti-bribery laws means *rising enforcement risk*: more law enforcement agencies now empowered to take action against your company. The severity of any single penalty might not be large, but in total your organization will have more potential penalties to worry about, and the likelihood of multiple penalties for the same misconduct will increase.

Compliance programs will be crucial tools to alleviate the threat of that increased risk. For example, the U.K. Bribery Act lists six "Adequate Procedures" that, if a company implements them fully, qualify as a full defense against an act of bribery committed on the company's behalf. Sapin II simply requires that all covered organizations implement a compliance program with eight specific elements.

The German Federal Court of Justice has ruled that the existence of a compliance program must be considered as a mitigating circumstance for companies charged with misconduct. Ireland's forthcoming anti-corruption law will also require companies to take "all reasonable steps" and exercise "all due diligence" to avoid liability for a bribery offense.

The full amount of relief a company might receive for having an effective compliance program will vary greatly. Broadly speaking, however, the *lack* of a compliance program would preclude almost any outcome *except* a prosecution. The relief a company might get—a deferred- or non-prosecution agreement, reduced penalties, or even a declination to bring charges—will all depend on having a compliance program with working, recognizable components.

WHAT EFFECTIVE COMPLIANCE PROGRAMS MUST DO

The new anti-corruption push across EMEA emphasizes the same traits for "effective" compliance over and over again. Most of the traits trace back to the United States, in guidance published by the Justice Department and Securities & Exchange Commission in 2012: The Ten Hallmarks of an Effective Compliance Program.

Consider the following comparison between the FCPA, the U.K Bribery Act, and Sapin II.

FPCA 10 HALLMARKS	SAPIN II 8 ELEMENTS	BRIBERY ACT 6 PROCEDURES
Tone at the Top		Top-level commitment
Code of Conduct	Code of Conduct	Communication & Training
Risk Assessment	Risk Assessment	Risk Assessment
Training and Continuing Advice	Training	Communication & Training
Incentives and Discipline	Discipline against violators	Proportionate Procedures
Third-Party Due Diligence	Third-Party Due Diligence	Due Diligence
Confidential Reporting & Investigation	Internal Reporting System	Proportionate Procedures
Oversight, Autonomy & Resources	Effective Internal Control	Proportionate Procedures
Periodic Review & Evaluation	Periodic Review	Monitoring & Review
Mergers & Acquisitions		

The purpose here is to show that EMEA views on an effective compliance program are evolving toward a common standard with the U.S. We should *not* take any gray boxes above to mean that a certain element is "missing" from one law or another. (For example, Sapin II definitely supports a strong tone from the top; whistleblowing, discipline, investigations are all endorsed by the Bribery Act, as proper procedures.)

THE CHALLENGE FOR COMPLIANCE OFFICERS

For compliance officers at most global corporations, it's not news that compliance programs must have all these elements to be *effective*. The real challenge will be how to roll out those elements across the EMEA region in a way that's *efficient*.

That means compliance officers will need to *simplify* some processes—say, drafting a Code of Conduct that stresses key ethical principles and objectives—without delving into extensive procedures that might not work in every single EMEA jurisdiction. Compliance officers will also need to automate other processes—chief among them, due diligence of third parties; as well as analytics-based tasks that feed into the periodic evaluation and review of program effectiveness.

Both of those points mean that compliance officers will need to sharpen their ability to assess risk and business process, and to develop better technology for automation and analytics.

Throughout this journey, compliance officers will need to work with senior executives and business-unit leaders in EMEA to stress the fundamental importance of anti-bribery compliance. Automation of third-party vetting, for example, could ruffle the feathers of lower-level executives accustomed to finding their own third parties. New controls and procedures might exasperate or confuse employees and third parties, who then devise work-arounds so they can "get on with their jobs"—while actually creating new risks beyond the CCO's oversight.

A full body of knowledge about how EMEA jurisdictions will enforce anti-bribery law remains unclear, and will evolve over time. Still, the importance of having a compliance function to respond to the laws is clear, and what that function's basic capabilities should be is clear as well. Compliance officers will need to implement those capabilities in a complex legal framework; a task that will not be easy.

Without question, however, the task is necessary.

ABOUT STEELE COMPLIANCE SOLUTIONS, INC.

Steele is your best source for smarter business decisions, offering an integrated risk management solution that will help you to thoroughly evaluate and mitigate potential risks. With products and services that incorporate industry leading artificial intelligence, training, automation, and human diligence, we partner with our clients to help them to not only understand the world of the people they do business with but to arm employees with the right tools and information to continue to make ethical decisions. At Steele we believe we are smarter together - with the right combination of data, insights, technology and people, we can change the world for the better.

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