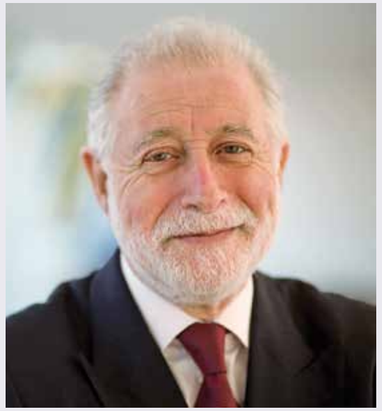

COOPERATION OF PETERS & PETERS LONDON AND THE LAW OFFICE OF TOMISLAV ŠUNJKA – U.K. BRIBERY ACT

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Those Doing Business in or With the U.K. Need to be Aware

The most controversial section of the 2010 Bribery Act (the Bribery Act) is that which makes it a crime for companies to have benefited from bribery, which the state believes was preventable

Since July 1st 2011, there have been new laws in place which can see businesses investigated (with collateral reputational damage), prosecuted, fined, debarred, made subject to civil recovery orders, or the subject of deferred prosecution agreements, if they bribe their way to profit anywhere in the world. There are both certainties and uncertainties for both business and compliance professionals. One notable certainty is that the U.K. has robust, if not always efficient, anti-money laundering laws and regulations, with more than 350,000 suspicious activity reports being made each year. Companies in the so-called "regulated sector" face prosecution for failing to report suspicion or knowledge of money laundering. This is one way in which intelligence reaches agencies like the Serious Fraud Office who are the lead anti-corruption prosecutors. Other intelligence arises from whistleblowing, due diligence in the M&A process and of course discovery by overseas agencies. The moment the mere fact of an investigation reaches the public domain there is lasting reputational damage even if the outcome is favourable for the company.

As Tomislav Sunjka wrote in the March issue, the key note of any compliance programme must be the preservation of corporate integrity. The Bribery Act punishes both public and private bribery, the giver as well as the receiver.

> "Since 2011 we at Peters & Peters have been called upon to advise SMEs as well as multinationals on the adequacy of their controls and to devise new codes of practice"

In compliance with the OECD Convention, the Bribery Act specifically criminalises the bribery of a foreign public official.

The immediate effect of this radical legislation was to persuade businesses to introduce and implement bespoke compliance programmes. Since 2011 we at Peters & Peters have been called upon to advise SMEs as well as multinationals on the adequacy of their controls and to devise new codes of practice.

Back in 2011, U.K. boardrooms were fearful that there would be a tsunami of prosecutions and sanctions on business, which would make U.K. companies globally uncompetitive. This has not been the case. For example, provided corporate hospitality is kept within reasonable bounds and is not so excessive as to be self-evidently a bribe, it is unlikely to attract the attention of the Serious Fraud Office. There is no obligation to prosecute, even where evidence exists, unless it is in the public interest so to do. The prosecuting authorities have issued guidance which, while promising no certainty of outcomes, encourages self-reporting by companies and total cooperation in investigation if they are to have a chance of avoiding prosecution. Instead, they might hope to be offered a Deferred Prosecution Agreement with a financial payment, or a non-penal solution like a Civil Recovery Order. Of course, individuals who have transgressed remain at risk of prosecution, DPAs are not available to them. The uncertainties arise because it can be months or years after the discovery of bribery that the company learns of the outcome preferred by the agency and, in the case of a DPA, any arrangement is subject to judicial scrutiny.

One of the problems facing those advising businesses in those circumstances is how to proceed. Should there be an internal investigation, possibly in collaboration with the prosecuting agency. Should senior executives be sacrificed or supported, and when this decision should be made. Lastly what should be done when faced with investigations in more than one jurisdiction, all with different laws and different policies.

Some of these uncertainties could have been removed by now, had there been a significant number of cases in the last five years, but this has not been the case. At the time of writing, while there are a number of companies awaiting the discovery of their fate with at least one awaiting trial, there has so far only been one prosecution, met with a plea of guilty, one Deferred Prosecution Agreement sanctioned by the court and one Civil Recovery Order.

There have of course been other cases dealing with delinquent conduct under the pre Bribery Act law. Companies doing business in or with the U.K. will need to seek immediate legal assistance when bribery is suspected, let alone discovered, in the hope that those advising them can at least give them some idea of the possibilities or even probabilities, if not the certainties.

The burden then shifts to the company to demonstrate that the bribery occurred notwithstanding that there were adequate procedures in place. What procedures are to be considered adequate? The U.K. Government has published guidance of a generic nature setting out six principles, which any guidance programme needs to possess if it is to have a chance of being regarded as adequate:

- **The procedures must be proportionate;**
- **The company must demonstrate a top down commitment to preventing bribery;**
- **The business must make a realistic assessment of risk;**
- **Due diligence enquiries must be searching;**
- **The compliance programme must be communicated throughout the business and training must be of a sufficiently high quality and repeated at appropriate intervals; and**
- **Any compliance programme must be subject to constant monitoring and review.**

U.K. Bribery Act – Does it Apply to Serbia, Serbian Public Officials and Businessmen at All?

In own defense and to prevent the bribery, commercial organization is obliged to place adequate procedures designed to prevent persons associated with them from undertaking such conduct and bribes

From July 1st, 2011 the answer is YES. I would like to explain the public function or activities to which bribe relates. The bribe relates to any function of a public matter, any activity connected with a business, trade and professions, any activity performed in course of a person`s employment and any activity performed by or on behalf of a body of persons, corporate or unincorporated. A person – public official or another by his request is guilty for bribe if requests or accepts a financial or other advantage intending that, in consequence, perform a relevant function or activity improperly.

It is important to say that function or activity is relevant even if it has no connection with the U.K., and is performed outside the U.K.

Who are foreign public officials? "Foreign public official" is an individual who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the U.K., exercises public function, for or on behalf of a country or territory outside the U.K., or for any public agency or public enterprise of that country or territory, or is an official or agent of a public international organization. Hence Serbian appointed or elected individuals, too?

Does business people and commercial organizations have obligation to prevent bribery? Absolutely!

Commercial organization is guilty for bribe if its legal representative and responsible person fails to prevent bribery and/or bribes another person intending to obtain or retain business for commercial organization, or to obtain and/or retain an advantage in the conduct of business.

In own defense and to prevent the bribery, commercial organization is obliged to place adequate procedures designed to prevent persons associated with them from undertaking such conduct and bribes.

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As Mr. Raphael Monty QC said, those companies – commercial organizations commits criminal act if they have benefit from bribery. Companies have burden of proof to demonstrate that they have adequate policy and procedures.

Since 2011 Law Office of Tomislav Šunjka is engaged to advise companies who planed and performed business from U.K. to Serbian and Balkan market on the adopting adequate policy and procedure, internal investigation and procedure as a consequence of this as a criminal procedure, damage procedure, employment issues and etc. We did it through assessment of risks, due diligence, integrity check and compliance programs. U.K. companies from regulated sectors (financials services, pharmaceutical sector, energy sector and others) were especially interested. Particular difficulties occur in cases where there are more than two jurisdictions. Due to a favorable Agreement on avoidance of double taxation between Serbia and the Netherlands, the majority of investors, commercial organizations and companies from U.K. operating in Serbia, form a holding company in the Netherlands, which then operates in Serbia. This type of complex organizational structure requires a more complex legal support. This type of structure is also used by the institutional investors as well as investors that have the status of an international organization such as EBRD and other. Usage of this type of structure is legal and legitimate, yet, I have to point out that U.K. Bribery Act also has effect towards structures which use more than one jurisdiction for doing business. Hence, prevention and adequate policy and procedure are absolutely necessary for doing integrity business in each level of this kind of structure.

Serbia does not have such a relevant Law or Act. Criminal offence of bribery is regulated in Serbian Criminal Code ("Official Gazette of RS", No. 85/2005, … 108/2014). Criminal responsibility of companies as legal entities is regulated by a special law – Commercial offences act ("Official Gazette of the SFRY", Nos. 4/77 … 3/90, "Official Gazette of the FRY", Nos. 27/92…64/2001 and "Official Gazette of RS", No. 101/2005 - other law). In my opinion, in this phase of development of legal system in Serbia and its harmonization with internationally recognized legal standards and standards of EU, it is very important to adopt a special, elaborated law, which would define the offences of bribery and which are the functions or activities to which bribery relates. When looking at entire criminal legislative in Serbia, it is needed to say that appropriate legal institutes and instruments appear in several sources and laws, yet their usage is not primary. Primary responsibility of an individual is still widespread, while victims are usually referred to civil procedure, which can last for years after the criminal procedure. Criminal liability of companies occurs in very few cases in practice and there is no publicly available records and practice of such cases. Also, there is no official statistics of such cases. This can have two meanings: that the statistics or cases register does not exist, or that there are no cases of foreign investment/investment bribes, or that said cases exist, however they are not processed for different reasons.

It is desirable to establish a case database similar to one of the World Bank, where the cases of corruption, explanations and way of completion of the case, sanctions, enforcement, fines and other, would be presented to public. This would reduce the arbitrariness and establish binding jurisprudence which would have its origin in the new law / act.