

COMPLIANCE PITFALLS IN COMMUNICATIONS WITH THE RUSSIAN CUSTOMS: OVERVIEW OF ANTI-CORRUPTION REGULATIONS AND ENFORCEMENT TRENDS

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1 Introduction

Russia is granting various investment friendly regimes for foreign investors and importers. To exploit advantages and avoid compliance pitfalls, which might impact the business, it is essential to observe Russian anti-corruption legislation. Although proper compliance with local rules may be difficult due to transparency issues and the overall national environment, the consequences of violations force the business to closely scrutinize these requirements and constantly improve upon business process focusing on the high-risk spheres.

Over the past nine years, in which Transparency International is maintaining the Corruption Perceptions Index¹, Russia has climbed four places up in the ranking: from 133rd to 129th. Besides, Russia continues to implement the Group of States against Corruption (GRECO) recommendations towards the Russian policies on anti-corruption, which, generally, GRECO finds satisfactorily.

One of the first public bodies that foreign players may face upon trading with Russian partners is the authorized body for foreign trade operations related to the import and export of goods into and out of Russia is the Federal Customs Service of Russia ("**FCS**"). As the FCS is a first pit stop for the importation of goods into Russia, usually the officials of the FCS are the main subject of the corruption offenses related to the turnover of foreign goods in Russia.

To avoid the unnecessary attention of local authorities and potential application of administrative or criminal sanctions towards businesses upon importing goods into Russia, it is advisable that the importers should be aware of local legislation, commercial standards, and legal practice to review all possible corruption risks on the Russian market.

2 Legal Framework

2.1 International aspects

Russia is a party to a significant number of international treaties that target combating corruption in its every manifestation, including the following basic agreements:

- (A) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- (B) Council of Europe Criminal Law Convention on Corruption (1999);
- (C) UN Convention against Corruption (2003).

¹ <https://www.transparency.org/en/countries/russia> (last access: 11 June 2021)

The ratification of the above treaties led to implementation of the international regulations, recommendations, and practices in the Russian anti-corruption legislation and adoption of basic national law on combating corruption. The FCS is guided by these treaties along with the national legislation implementing the relevant rules.

International organizations, such as GRECO or the Council of Europe Secretariat, have acknowledged on numerous occasions that the Russian legal framework is successfully seeking to introduce the best international anti-corruption standards. However, certain recommendations of the relevant organizations on improving local regulations can be implemented by the authorities in the Russian legislation further.

2.2 Domestic Legislation

After ratification of the UN Convention against Corruption, the Russian federal legislature adopted Federal Law No. 273-FZ dated 25 December 2008 "On Combating Corruption" ("**Law on Combating Corruption**") that serves as the main legal basis in Russia to regulate matters related to the corruption for both public and private sectors.

Although the Law on Combating Corruption is the core of legislation, the local legal framework regarding corruption matters includes a vast layer of secondary acts including other federal laws, President's decrees, resolutions of the Russian Government and countless bylaws adopted at the local level by executive bodies.

Separately, liabilities for the corruption-related criminal offenses that target individuals and administrative offenses of legal entities are established in the Criminal Code and Code of Administrative Offences respectively. The Russian legislation does not provide for a corporate criminal liability concept.

The FCS developed internal rules and policies on preventing and treating instances of corruption as well. These policies were developed based on the superior federal legislation applicable to all public subjects (such as state and municipal officials) which were adapted to the FCS's specific activities. At the same time, the FCS's anti-corruption legal approach is based on the general federal rules binding for all citizens, legal and public entities.

2.3 Definitions

Russian law distinguishes between active and passive corruption and, therefore, its main elements, active and passive bribery. There are separate legal norms regulating issues of giving and taking a bribe in Russia.

The Criminal Code defines a bribe as money, securities, other property or illegal provision of services or other property rights transferred to the official or foreign/international official (including when a bribe is transferred to another person at the official's instructions) for performing actions or omission in favor of the briber or their principals. Herewith, these actions or omissions shall be part of the administrative powers of the official or if this official may contribute to these actions or omissions due to its position as well as provide general patronage or connivance in service.

The Code of Administrative Offences generally envisages the same definition of a bribe as the Criminal Code but uses another term ("illegal remuneration"). In particular, the administrative liability of a legal entity is established for illegal transfer, offer or promise by any person acting

on behalf or in interests of a legal entity to public (as well as commercial or NPO) officials of anything of pecuniary value for any actions or omission procured in the interests of such a legal entity.

The law splits the officials into three categories defined as follows under Article 285 of the Criminal Code and accompanying legal practice:

- (A) national official – person permanently, temporarily or by special authority performing the functions of a government representative or performing administrative or economic functions in state-owned enterprises and public bodies;
- (B) foreign official – appointed or elected person holding any position in a legislative, executive, administrative or judicial body of a foreign state or performing any public function for a foreign state;
- (C) official of the public international organization – international civil servants, persons authorized to act on behalf of a public international organization, members of international parliamentary assemblies of organizations to which the Russian Federation is a member, persons holding judicial positions in any international court whose jurisdiction is recognized by the Russian Federation.

For the purposes of this article, the above categories may be together referred as “officials”, if otherwise is not expressly stated.

Generally, definitions of each category of officials are based on the UN Convention against Corruption (2003) and were implemented into the domestic legal framework without any significant changes.

2.4 Who can be prosecuted

In terms of active bribery, legal entities can face administrative liability, while the employees and management of a company will be subject to criminal liabilities. The local authorities determine whether to prosecute a legal entity or its employees or management on a case-by-case basis, depending on the given circumstances.

As to passive bribery, a business may be liable in this case only if private bribery took place.

2.5 Jurisdiction Scope

In the majority of cases, the jurisdiction of the Russian Federation (including the effect of the Criminal Code and the Code of Administrative Offences) is extended to its borders (as well as territorial sea and airspace) and applies in case of any offenses committed within them.

However, if the bribery offense is made against the interests of the Russian Federation or the country’s residents (and a foreign state did not prosecute the offender), Russian authorities may hold accountable such persons according to the Russian legislation. However, Russian authorities rarely use this entitlement due to various factors.

Overall, the focus of domestic prosecution is aimed at the offenses committed internally in Russia both for active and passive bribery cases and it hardly ever concerns the violations perpetrated outside of the country’s territory. Concurrently this leads to minor risks of criminal

or administrative liability for the foreign persons residing outside of Russia as well because of lack of effective legal means to reveal the offense and reach the offenders.

3 Enforcement

3.1 Legal Consequences

(A) Criminal Liability for Active Public Bribery

The sanctions for giving bribery to public officials established in Articles 291 and 291.2 of the Criminal Code. The same Articles list the aggravating circumstances.

The sanctions for giving (as well receiving or intermediating) minor public bribery in the amount up to RUB 10 000 (~USD 140) without any additional aggravating circumstances is the following:

- (i) fine of up to RUB 200 000 (~USD 2 800); or
- (ii) fine in the amount of the wage or other income of the convicted for a period of up to 3 months; or
- (iii) correctional labor for up to 1 year; or
- (iv) restriction of freedom for up to 2 years; or
- (v) imprisonment for up to 1 year.

If an individual has already been prosecuted for other bribery crimes will commit minor public bribery the sanctions will increase as follows:

- (i) fine of up to RUB 1 000 000 (~USD 14 000); or
- (ii) fine in the amount of the wage or other income of the convicted for a period of up to 1 year; or
- (iii) correctional labor for up to 3 years; or
- (iv) restriction of freedom for up to 4 years; or
- (v) imprisonment for up to 3 years.

If the amount of the transferred public bribe exceeds RUB 10 000 (~USD 140) then the law also considers the aggravating circumstances, such as:

- (i) amount of bribery;
- (ii) bribe was given for procuring illegal actions (omission);
- (iii) conspiracy on the side of bribe giver.

The most severe sanction for giving a bribe under Article 290 of the Criminal Code may be the following:

- (i) fine of up to RUB 4 000 000 (~USD 55 600); or
- (ii) fine in the amount of the wage or other income of the convicted for a period of up to 4 years; or
- (iii) fine in the amount of up to 90 times the amount of a bribe with potential ban on holding certain position or making professional activities for up to 10 years; or
- (iv) imprisonment for up to 15 years with a potential fine of up to 70 times the amount of a bribe and potential ban on holding certain position or making professional activities for up to 10 years.

The intermediation or any other contribution in bribery process (including promising or proposing intermediation) are also subject to the same aggravating circumstances listed above. The maximum sanction for these offenses under Article 291.1 of the Criminal Code is the following:

- (i) fine of up to RUB 3 000 000 (~USD 42 000); or
- (ii) fine in the amount of the wage or other income of the convicted for a period of up to 3 years; or
- (iii) fine in the amount of up to 60 times the amount of a bribe with potential ban on holding certain position or making professional activities for up to 5 years; or
- (iv) imprisonment for up to 10 years with a potential fine of up to 30 times the amount of a bribe and potential ban on holding certain position or making professional activities for up to 5 years.

(B) Administrative Liability for Active Public Bribery

Article 19.28 of the Code of Administrative Offences provides for the administrative liability for legal entities only and in a form of an administrative fine of up to 3 times the amount of a bribe but not less than RUB 1 000 000 (~USD 14 000) with the seizure of such a bribe or property in a similar amount.

The aggravating circumstances include only the amount of a concerned bribe. If a bribe exceeds RUB 20 000 000 (~USD 278 000) the law provides for a maximum sanction in the form of an administrative fine of up to 100 times the amount of a bribe but not less than RUB 100 000 000 (~USD 1 400 000) with the seizure of such a bribe or property in a similar amount.

(C) Exemptions out of liability

As a rule, both the Criminal Code and the Code of Administrative Offences provide an exemption out of liability in case a bribe giver contributed to the solving or investigation of an offense or a bribe was extorted by an official or the person.

For the criminal cases, for the exemption purposes, a bribe giver should actively assist the prosecution bodies, for example, help in exposing the persons involved in the crime or revealing a property transferred as a bribe. Besides, the bribe giver may avoid criminal liability if he or she voluntarily report to the prosecution body about such a fact of giving a bribe.

As for the administrative liability, the general exemption is not applicable when a bribe has been given to the foreign officials or officials of public international organizations in carrying out the commercial transactions. Although this condition targets the foreign bribery conducted by Russian companies, we see no practice of implementation of this clause.

3.2 Practice

According to the FCS director, the FCS has initiated 25 corruption-related criminal cases against Russian customs officials for the first 3 months of 2021. During the identical period in last year, 13 criminal proceedings were initiated, and 148 criminal cases bribery-related cases concerning the FCS over 2020 in total.²

There is no public statistic on the administrative prosecution of the legal entities regarding customs bribery cases since the Prosecutor General's Office of the Russian Federation discloses only general statistics on administrative indictments, which state 64 court administrative indictments against Russian legal entities for the first five months of 2021.³

Overall, we see neither positive nor negative dynamics in the amount of administrative and criminal bribery-related cases involving the FCS' officials in Russia for the past three years. However, there are certain positive trends in customs procedures, including consolidation of customs points, simplification and digitalization of customs clearance which reduce the direct involvement of FCS officials in customs clearance process.

3.3 Recent Developments

Since 2018 the FCS is adopting plans for combating corruption in the customs bodies of the Russian Federation according to the requirements of the Law on Combating Corruption. The effective plan consists of a list of measures that shall be performed by the internal divisions and officials of the FCS in order to reduce the level of corruption in the FCS. However, these plans are heavily based on already existing anti-corruption legislation and regulations and do not require the development of any new effective rules and may be considered as a guideline or checklist for the FCS' divisions for implementation of the anti-corruption policies.

In March 2021, the State Duma (the lower house of the Russian Parliament) adopted in the first reading the draft law proposing to exempt officials, judges, prosecutors and other state personnel (including the FCS' officials and employees) from punishment for violation of anti-corruption norms, if the violations were committed due to circumstances beyond the control of such persons.

The draft law also provides for certain circumstances as valid reasons for violating anti-corruption laws which include natural disasters, including earthquakes, floods, hurricanes, as well as fires, mass diseases, strikes, military actions, terrorist acts. According to the draft law

² <https://customs.gov.ru/press/aktual-no/document/275524> (last access: 11 June 2021)

³ <https://epp.genproc.gov.ru/web/gprf/activity/combating-corruption/registry> (last access: 11 June 2021)

such “force-majeure” corruption is possible under the conditions of restrictive measures introduced by the state authorities. This draft law is under further consideration at the moment.

4 Recommendations

For the foreign companies having local partners in Russia, we recommend ensuring that their compliance policy is tailored to compliance risks and pays due attention to the third parties and due diligence. It is advisable to ensure that the partners comply with the provisions of compliance standards and principles, for example, by including the corresponding obligations (including the auditing rights over the partner’s business activities) in contracts.

Questionable terms of contracts and contractual structures should be checked from local perspective. Practically, there are cases when a Russian counterparty rushes a foreign supplier to deliver goods to Russia. In such case foreign companies do not make a proper analysis of contractual schemes and agree to conditions proposed by Russian partners. As a result, it may turn out that the deliveries were organized by the partner bypassing anti-corruption laws.

Despite the risk for a foreign company to be held liable under Russian legislation is extremely insignificant, this may entail reputational risks, as well as attract the attention of local authorities of the exporter, as well as other authorities, for example, in accordance with the UK Bribery Act (2010) and the US Foreign Corrupt Practices Act (1977).

As regards Russian subsidiaries of the foreign companies, it is advisable to monitor and control subsidiaries’ compliance with global compliance policies. In practice, management of the Russian subsidiaries may become tolerant of local business practices and “communication” with customs authorities. The above risks have increased in view of the COVID 19 pandemic since business divisions are eager to compensate for lockdown periods.

If giving a bribe to a customs officer is revealed, this will cause increase in attention of the FCS to supplies to the Russian subsidiary, which may not only slow down the delivery of goods but also lead to a complete stop of supplies to Russia due to various administrative barriers.

At the same time, Russian or foreign importers and exporters may electronically sign the Charter of the Bona Fide Participants of the Foreign Trade⁴. The parties to this Charter make public commitments regarding using only fair and good faith practices when interacting with partners and public bodies (including the FCS). These commitments also include provisions on the prohibition of any forms of corruption, declaration of compliance with the provisions of the Anti-Corruption Charter of Russian Business⁵ and compliance with anti-corruption Russian legislation. Although the Charter does not prevent the potential liability in case of corruption offenses made by its parties, it does show the position of the foreign trade participants towards the corruption, may cause simplification of import and export procedures and reduce the level of attention of the FCS to the imported goods.

As to the foreign bribery conducted outside of Russia by the Russian persons, we do not see any recent successful cases of bringing to the liability of such bribe givers in Russia. Moreover, we understand that establishing the legal provisions concerning these foreign acts of bribery

⁴ <https://www.dobro-ved.ru/> (last access: 17 June 2021)

⁵ <http://against-corruption.ru/khartiya/> (last access: 17 June 2021)

was more a technical implementation of the international treaties and recommendations of international recommendations into national legislation.

Currently, Russian bribery prosecution is mainly focused on domestic corruption. At the same time, we believe that eventually, the situation may change due to the development of national legislation and cooperation with foreign customs. Therefore, it is advisable to be prepared for expanding the scope of the Russian prosecution authorities towards the corruption acts conducted at non-Russian customs. Besides, elaboration of the compliance policies regarding this issue at the present will also have a significant contribution to the general anti-corruption strategy and mitigation of related risks since it would produce the unified compliance position of a company on all customs matters in each relevant jurisdiction.